IN THE

Supreme Court of the United States

October Term, 1923

WILLIAM R. WARNER & COMPANY,
Petitioner,

against

ELI LILLY & COMPANY,
Respondent.

No. 32

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

PETITIONER'S BRIEF.

Statement.

I. This cause comes up on a writ of certiorari granted by this Court on May 15, 1922,* and issued on May 27, 1922, upon petition of William R. Warner & Company, defendant in the District Court, appellee in the Circuit Court of Appeals, to review the decision of the Circuit Court of Appeals reversing the decision of the District Court for the Eastern District of Pennsylvania, and directing an injunction to issue against the defendant-petitioner as hereinafter stated (Rec., Vol. III, p. 1686).

II. The suit was brought to procure an injunction against the manufacture and sale by defendant of a product known as "Quin-Coco," on the ground of infringement of plaintiff's alleged common law trade-mark rights

*259 U. S., 578.

and of unfair competition. By an error in the printing of the record, the bill of complaint was omitted, but subsequently has been printed, and will be inserted in Volume I. An amendment to paragraph 9 of the bill, which was allowed by the District Court, is printed at pages 411-413, Volume I, of the record. Defendant's answer is printed in Volume III of the record, pages 1191-1195, and amendments to the answer occasioned by the amendment to the bill above referred to, are printed at pages 1561-1564 of Volume III of the record. Upon the joining of issue, testimony was taken by deposition in various parts of the United States, and a voluminous amount of evidence adduced by both parties. The case was heard upon the depositions so taken, no witnesses being examined in open court.

On the final hearing in the District Court, the bill was dismissed (Rec., Vol. III, p. 1651), on the ground that the plaintiff had established no trade-mark rights in the name, color, physical appearance or the formula of the product manufactured and sold by the plaintiff known as "Coco-Quinine," and that plaintiff had failed to prove by competent and credible evidence that the defendant had been guilty of unfair competition. The opinion of the District Court, by THOMPSON, J., is reported in 268 Fed., 156, and a copy is to be found on pages 1646-1651 of Volume III of the record.

III. On appeal taken by plaintiff to the Circuit Court of Appeals for the Third Circuit, the decree dismissing the bill was reversed (Rec., Vol. III, pp. 1660, 1661), and the cause remitted to the District Court, with directions to issue an injunction restraining the defendant hereafter from using chocolate as a coloring matter in its preparation named "Quin-Coco" (Rec., Vol. III, p. 1661). The opinion of the Circuit Court of Appeals by WOOLLEY, J., is reported in 275 Fed., 752, and a copy is to be found at pages 1656-1661 of Volume III of the record.

IV. A petition for a reargument was submitted to the Circuit Court of Appeals by defendant, on the ground that the learned Court had misinterpreted the evidence and placed its decision upon so-called facts which, not only were not established by the weight of evidence, but respecting which, to a large extent, there was no evidence whatever to support the stated conclusions, and that the scope of the injunction order went beyond permissible limits (Rec., Vol. III, pp. 1662-1678). This application was denied (Rec., Vol. III, p. 1684). On January 16, 1922, the mandate was issued from the Circuit Court of Appeals to the District Court in conformity with the decision of the former tribunal (Rec., Vol. III, p. 1685). Defendant thereupon petitioned this Court for a writ of certiorari to review the decision of the Circuit Court of Appeals, which was granted as above stated, and the case is now here for review upon such writ.

V. As stated in the opinion of the Circuit Court of Appeals, the case of the respondent is based upon the allegation of unfair competition and infringement of common law trade-mark rights. The bill alleged that defendant was guilty of unfairly "passing off" its product when the plaintiff's product was asked for, thereby deceiving and imposing upon purchasers. The bill of complaint prayed for an injunction restraining the defendant from the use of the name "Coco-Quinine," or the reverse form thereof of "Quin-Coco," as a trade-mark for its product; from the use of chocolate color as a distinctive mark for such product; from the use of chocolate flavor as a distinguishing mark for such product; from the use of any colorable imitations of said marks or designating characteristics in such manner as to be calculated to deceive the public into buying the goods of defendant for the goods of plaintiff; from selling any product compounded, flavored and colored to resemble plaintiff's, or any such near resemblance thereto as

might be calculated to deceive; from offering its product as a substitute for plaintiff's Coco-Quinine, and from informing or instructing the trade or physicians that its said product can be substituted, sold and used for plaintiff's product.

VI. The District Court found that there was no infringement by defendant of any common law trademark of plaintiff, and with this conclusion the Circuit Court of Appeals agreed (Rec., Vol. III, p. 1658). On the issue of unfair competition, the District Court also decided in favor of the defendant-petitioner on the law and the facts. The Circuit Court of Appeals, while expressing agreement with the District Court on the law of unfair competition, reached a different conclusion "on the application of the law to what we regard as the controlling facts of the case" (Rec., Vol. III, p. 1658).

> "The defendant," said Judge WOOLLEY in delivering the opinion of the court, "realizing that the plaintiff had no exclusive right to the formula of its preparation, duplicated it by a preparation of its own and offered it to the trade in competition, as it had a right to do. But the trouble is with the manner in which it did it." (Rec., Vol. III, p. 1658.)

No findings of fact were made in either court, but the opinions in each court contain statements of facts which the respective authors of the opinions have inferred from the evidence.

The decision of the Circuit Court of Appeals condemned petitioner and confiscated this part of its business, because of the *manner* in which it exercised an admitted and adjudicated right.

The Circuit Court of Appeals directed the District Court

"to award an injunction restraining it [the defendant] hereafter from using chocolate as a coloring matter in its preparation named 'Quin-Coco'" (Rec., Vol. III, p. 1660).

VII. Two questions, therefore, are presented to this Court for its determination:

First: Whether or not the evidence warranted the decision of the Circuit Court of Appeals holding that the *manner* in which defendant exercised its legal rights to manufacture and sell its compound Quin-Coco in competition with plaintiff, required or justified that Court in depriving defendant of the further exercise of its admitted right.

Second: Whether, even if this Court should agree with the Circuit Court of Appeals that defendant had resorted to unfair methods of competition, the injunction granted did not go far beyond what was properly required to protect plaintiff from the further employment of such alleged unfair methods.

VIII. The following brief statement of the facts giving rise to the controversy is taken from the opinion of Judge THOMPSON in the District Court, these facts being substantially adopted by the Circuit Court of Appeals:

"The plaintiff is a corporation engaged, at Indianapolis, Ind., in the manufacture and sale of pharmaceutical and chemical products. It employs a large staff of traveling sales agents in selling its product to druggists and physicians throughout the United States. In 1899 it commenced the manufacture and sale of a liquid preparation known as 'Coco-Quinine.' It contains quinine as its therapeutic agent, and is designed for the administration of quinine sulphate in cases where the liquid form is preferred to capsules or

pills. Yerba santa is used in the compound to disguise the bitterness of the quinine, and chocolate syrup is used for a coloring and flavoring medium. The formula is not patented, and the preparation is not the subject of a registered trade-mark. It is put up in bottles with a label, with the word 'Lilly' in red script on a green background. The plaintiff, through its sales agents, was successful in introducing it and establishing extensive sale for it among pharmacists and dispensing physicians; that is, those who do not prescribe for their patients, but supply medicine from their own stock. The sales by druggists were upon physicians' prescriptions and to customers who inquired for chocolate-quinine or Coco-Quinine.

"The defendant is a Pennsylvania corporation, organized in 1908 to take over the long-established business of William R. Warner & Co., pharmaceutical and chemical manufacturers, and is chiefly owned and managed by by Mr. Henry Pfeiffer, Mr. Gustavus A. Pfeiffer, and Mr. G. D. Merner, through holdings of its stock, and they are also the owners of the Pfeiffer Chemical Company and Searle & Hereth Company. For the purposes of this suit, the united control and the close union in business of these three companies is not disputed.

"In 1906, the Pfeiffer Chemical Company put upon the market a product known as 'Quin-Coco.' This product is practically identical with the plaintiff's Coco-Quinine. It consists of quinine with yerba santa, vanillin, saccharin, and cocoa, with a syrup base. Since the organization of the defendant company in 1908 Quin-Coco has been manufactured by the Searle & Hereth Company and distributed solely by the defendant, the Warner Company.

"The defendant has since its organization, through its sales agents, distributed and sold Quin-Coco as a substitute for Coco-Quinine. It has * * * offered it and solicited orders for it from druggists as a substitute for Coco-Quinine

and identical to it in therapeutic value. It is not established, nor is it claimed, that it is known to consumers as a product of Eli Lilly & Co." (268 Fed., 156).

As above stated, both courts held that plaintiff had no trade-mark which defendant had infringed. WOOLLEY, J., in the Circuit Court of Appeals, said:

> "Although the plaintiff conceived the name Coco-Quinine and gave it a substantial commercial value (as evidenced by the large trade built upon it as well as by its almost literal appropriation by the defendant), the name is, nevertheless, but descriptive of the ingredients in the compound and, therefore, cannot become the subject of trade-mark" (275 Fed., 752, 754).

IX. In the District Court, the learned Judge dealt with the subject of the alleged unfair methods of competition as follows:

> "The plaintiff does not contend, and there is no evidence to show, any direct 'passing off' of the defendant's product for that of the plaintiff. The plaintiff contends that the evidence shows that the defendant's agents, in selling Quin-Coco as a substitute for Coco-Quinine, used unfair selling methods, in suggesting to druggists that, because of the similarity of the products in therapeutic value and appearance, it could be passed off by the druggist to the consumer who asked for Coco-Quinine, and could also be substituted by the druggists in prescriptions which called for Coco-Quinine, thus by suggestion inducing the druggist to pass off Quin-Coco for Coco-Quinine; and it is contended that there is sufficient evidence to establish the fact that druggists have, through these suggestions of defendant's salesmen, actually passed it off upon the public and physicians. The evidence upon this point has been carefully examined.
>
> "In a charge of this nature, the testimony

should be direct, clear and positive. But the testimony in most of instances consists rather of impressions of the witnesses as to what the defendant's salesmen meant than of statements of what they said. The answers of the witnesses upon the point of suggestions by defendant's salesmen of passing off were in many instances produced through objectionably leading questions. In substantially every instance in which unfair selling methods were attributed by the witnesses to the defendant's salesmen, the salesmen, upon being called, denied having made any such suggestions.

"The plaintiff has failed to establish the fact that the general officers or sales managers of the defendant authorized, advised, encouraged, or suggested the alleged unfair selling methods on the part of its salesmen. That Coco-Quinine and Quin-Coco were substantially identical products; that Quin-Coco could be purchased at a saving upon the price of Coco-Quinine; that it could be placed upon the market as a substitute for Coco-Quinine—were all matters which under the law the defendant had a right to represent to its customers. In view of the fact, which I find established under the evidence, that no officer or sales manager of the defendant authorized or instructed the salesmen in unfair selling methods, in view of the unsatisfactory testimony upon which unfair selling methods of the salesmen is charged, and in view of the positive denials of any such acts on the part of the salesmen, it is concluded that the plaintiff has failed to establish its right to a decree based upon unfair selling methods." (268 Fed., at pp. 160-161.)

X. In the Circuit Court of Appeals, a different view was taken of the same evidence, the opinion on this point running as follows:

"The defendant, realizing that the plaintiff had no exclusive right to the formula of its preparation, duplicated it by a preparation of its own and offered it to the trade in competition, *as it had a*

right to do. But the trouble is with the *manner* in which it did it. The defendant first procured samples of the plaintiff's preparation. Learning its ingredients, it then proceeded to make the same preparation. Its efforts were expended not so much in making a compound that would act like that of the plaintiff as they were in making a compound that would look like it and taste like it. It did not show the concern for the use of chocolate as a medium of color and taste that it showed in finding a chocolate that would give to its mixture the color and taste of the plaintiff's. In its laboratory it conducted experiments with chocolate of different kinds in an effort to get the precise color and taste derived from the chocolate used by the plaintiff. For a time it was not successful, but eventually it succeeded. It then placed the product on the market. It did not send its salesmen to prescribing physicians, presenting to them the merits of the preparation and soliciting their favor in prescribing its use as did the plaintiff, but it sent its salesmen directly to druggists, the retail dealers, and represented to them that its new product, Quin-Coco, is the same as the plaintiff's Coco-Quinine (referring to the latter by trade name and maker's name); that when Coco-Quinine is prescribed by a physician or asked for over the counter by a customer, Quin-Coco could be 'substituted without detection' and 'without anyone being the wiser.' Salesmen would at times pour both mixtures on paper to demonstrate the identity of colors. To induce druggists to make purchases, the defendant represented that substitution of Quin-Coco for Coco-Quinine was not only practicable but profitable because Quin-Coco was cheaper.

"We find this practice of the defendant's salesmen fully established by the evidence of an unusual number of witnesses, and that the practice, followed by its salesmen with the sanction of their superiors, was so general that the defendant is charged with knowledge of it and is, accordingly, answerable for it in the measure prescribed by law." (275 Fed., at p. 754; italics ours.)

XI. In its petition for a reargument, the petitioner urged upon the Circuit Court of Appeals that the so-called facts of the case upon which it based its conclusion that defendant had been guilty of unfair methods of competition justifying a reversal of the judgment of the District Court, not only were not established by the weight of evidence, but that, to a very large extent, they were supported by no evidence whatever. (See Petition for a Reargument, Rec., Vol. III, pp. 1662-1678). The petitioner respectfully urges the same contention upon this Court.

Assignments of Error.

(1) The Circuit Court of Appeals erred in holding that the manner in which petitioner offered its preparation Quin-Coco to the trade in competition with plaintiff justified the Court in holding that the petitioner had forfeited its right to use chocolate as a coloring agent because of such alleged misuse.

(2) The Circuit Court of Appeals erred in holding that petitioner's efforts were expended not so much in making a compound that would act like that of plaintiff as they were in making a compound that would look like it and taste like it.

(3) The Circuit Court of Appeals erred in holding that in its laboratory petitioner conducted experiments to get the precise color and taste derived from the chocolate used by plaintiff.

(4) The Circuit Court of Appeals erred in holding that petitioner

> "sent its salesmen directly to druggists, the retail dealers, and represented to them that its new product, Quin-Coco, is the same as plaintiff's Coco-Quinine (referring to the latter by trade name and maker's name); that when Coco-Quinine is

> prescribed by a physician or asked for over the counter by a customer, Quin-Coco could be 'substituted without detection' and 'without anyone being the wiser.'" (275 Fed., at p. 755.)

(5) The Circuit Court of Appeals erred in holding that to induce druggists to make purchases, the petitioner represented that substitution of Quin-Coco for Coco-Quinine was not only practicable but profitable because Quin-Coco was cheaper.

(6) The Circuit Court of Appeals erred in holding that this alleged practice of the petitioner's salesmen was fully established by the evidence of an unusual number of witnesses, or that such practice was followed by its salesmen with the sanction of their superiors, or that such practice was so general that the petitioner is charged with knowledge of it, and is accordingly answerable for it in the measure prescribed by law.

(7) The Circuit Court of Appeals erred in holding that the substitution of Quin-Coco for Coco-Quinine was extensively practiced by druggists.

(8) The Circuit Court of Appeals erred in holding the petitioner liable for any fraud practiced by a retail druggist who purchased from it the product Quin-Coco manufactured by it, or that the petitioner was an accomplice, if not a principal, in any such illegal practices.

(9) The Circuit Court of Appeals erred in holding that the evidence established unfair competition by the petitioner as against respondent in the sale of petitioner's product Quin-Coco.

(10) The Circuit Court of Appeals erred in holding that an injunction should issue restraining the petitioner, directly or indirectly, from inducing and enabling retail drug dealers to substitute Quin-Coco for Coco-Quinine.

(11) The Circuit Court of Appeals erred in holding that petitioner has forfeited its right to use chocolate as a coloring agent, because of its alleged misuse.

(12) The Circuit Court of Appeals erred in directing the District Court to award an injunction restraining the petitioner hereafter from using chocolate as a coloring matter in its preparation named Quin-Coco.

(13) The Circuit Court of Appeals erred in holding that the only practicable way of protecting the public and the respondent from a continuance of the alleged unfair practices of the petitioner was to deprive the petitioner of the use of the ingredient chocolate or cocoa.

(14) The Circuit Court of Appeals erred in holding that the use of chocolate as a coloring matter in its preparation named Quin-Coco alone made effective the practices alleged to have been employed by the petitioner in competition with respondent in the sale of its product Quin-Coco.

ARGUMENT.

POINT I.

The entire record is before this Court with the same power to decide the case presented to the Circuit Court of Appeals as that Court had.

In *Lutcher & Moore Co.* v. *Knight*, 217 U. S., 257, this Court, having granted a writ of certiorari, reversed the decree of the Circuit Court of Appeals on the ground that that Court had disposed of the case on questions not raised by either party and contrary to the attitude of the District Court towards the defenses interposed. The Court said (p. 267):

> *"It is undoubted that by the operation of the writ of certiorari, * * * the entire record is before us with power to decide the case as it was presented to the Circuit Court of Appeals, by reason of the writ of error issued out of that court.* Certain is it also that the Judiciary Act of 1891 contemplates that, as a general rule, where under its provisions a case comes to this court on certiorari * * * it will be disposed of so that the mandate of this court, to avoid circuity, will go directly to the Circuit [district] Court." (Italics ours.)

The Court declared that by reason of the failure of the Court below to consider the case before it, the record presented an exception to the general rule of procedure and therefore reversed the judgment and remanded the case to the Circuit Court of Appeals to the end that the duty to hear and decide the case might be performed.

In *Delk* v. *St. Louis & S. F. R. R. Co.*, 220 U. S., 580, a case of negligence, a verdict was rendered for the plaintiff. On appeal to the Circuit Court of Appeals, the judgment was reversed on the ground that the jury were led incorrectly to suppose by the charge of the judge that the

Safety Appliance Act did not impose an absolute duty to keep its cars in good order at all times.

In this Court it was held that the law was incorrectly stated by the Circuit Court of Appeals, and that the Safety Appliance Act did impose an absolute duty to provide and keep proper couplers at all times and under all circumstances, citing *Chicago, B. & Q. Ry. Co.* v. *U. S.*, 220 U. S., 559.

The Court said (p. 588):

> "In this state of the record what must be done with the case? As the case is here upon certiorari to review the action of the Circuit Court of Appeals, *this court has the entire record before it* with the power to review the action of that court as well as direct such disposition of the case as that court might have done when hearing the writ of error sued out for the review of the action of the Circuit Court. *Lutcher & Moore Co.* v. *Knight*, 217 U. S., 257-267. In this view, the judgment of the Circuit Court of Appeals must be reversed, because, for the reasons above stated, it erred in not holding that the statute, * * * imposed on the carrier an absolute duty to provide its cars, * * * with the required couplers, and keep them in proper condition, * * * without any reference to the care or diligence * * * exercised in performing its statutory duty. But on looking further into the record from the Circuit Court, we find that no error of law was committed by that court; * * * the judgment of the latter court must be affirmed." (Italics ours.)

After granting the writ of certiorari, the Supreme Court determines the questions raised by the record, and whether the decree brought up for review is justified by the law and the testimony.

In *The Conqueror*, 166 U. S., 110, the Court stated there were two questions involved in the merits of the case. First, whether the vessel was taxable under the

tariff laws, and, second, *whether the award of damages was justified by the law and the testimony.*

The Court not only discussed the evidence but stated that the testimony of experts fell far short of establishing such a loss of profits as to entitle the libellant to recover a large sum for the detention of the vessel and that the testimony was insufficient and the judgment of the Circuit Court of Appeals therefore was reversed.

POINT II.

In so far as the facts were found concurrently by both the District Court and the Circuit Court of Appeals they will be accepted as conclusive in this Court unless error is clearly shown.

For the purposes of this discussion we treat the statements of fact in the opinions as findings.

In *Compania La Flecha* v. *Brauer,* 168 U. S., 104, the Court said (p. 123):

> "Upon consideration of the conflicting testimony, with the aid of the careful arguments of counsel, no ground is shown for reversing or modifying the conclusions of fact reached by both courts below. *Their concurrent decisions upon a question of fact are to be followed, unless clearly shown to be erroneous. Moorewood* v. *Enequist,* 23 How., 491; *The Richmond,* 103 U. S., 540, and cases cited; *The Conqueror,* 166 U. S., 110, 136." (Italics ours.)

In *Stuart* v. *Hayden,* 169 U. S., 1, this Court, on certiorari, considered the evidence, quoting from the testimony, but declared (p. 14):

> "We will add, that as the Circuit Court and the Circuit Court of Appeals agreed as to what were the ultimate facts established by the evidence, this

> court should accept their view of the facts unless it clearly appeared that they erred as to the effect of the evidence."

In *Baker* v. *Cummings*, 169 U. S., 189, which was an appeal from the Court of Appeals of the District of Columbia, affirming a judgment of the Supreme Court of said District, this Court analyzed the evidence upon the question of the fact of knowledge of a party, and whether he remained silent for three years after acquiring such knowledge.

The Court said (p. 198):

> "In entering upon an analysis of the evidence upon this particular subject, we shall be governed by the principle determined by this Court—of which *Stuart* v. *Hayden*, 169 U. S., 1, decided at the present term, is the last expression—that when *two* courts have reached the same conclusion on a question of fact, their finding will not be disturbed unless it be clear that their conclusion was erroneous."

The Carib Prince, 170 U. S., 655:

> "The settled doctrine of this court is that the concurrent decisions of *two* courts upon a question of fact will be followed unless shown to be clearly erroneous" (p. 658).

The Wildcroft, 201 U. S., 378:

> "This finding of two courts will ordinarily not be disturbed, and is usually accepted by this court as conclusive" (p. 387).

La Bourgogne, 210 U. S., 95:

> "We may not disturb the concurrent findings of both the courts below * * * unless we are of opinion that those findings were so unwarranted by the evidence as clearly to be erroneous" (p. 114).

Baker v. *Schofield*, 243 U. S., 114:

In this case the Court said (p. 118):

> "Both the District Court and the Circuit Court of Appeals found that the sale from Baker to Simpson was only colorable, and that Simpson purchased the property for Baker. Our consideration of the evidence must be governed by the well settled rule in this court that, when two courts have reached the same conclusion on a question of fact, their finding will not be disturbed unless it is clear that their conclusion was erroneous. [Citing cases.] The concurrent decisions of the courts upon the establishment of a trust as a question of fact will be followed unless shown to be clearly erroneous."

To the same effect are

Southern Ry. Co. v. *Puckett*, 244 U. S., 571;
Piedmont & Georges Creek Coal Co. v. *Seaboard Fisheries Co.*, 254 U. S., 1;
Geddes v. *Anaconda Copper M. Co.*, 254 U. S., 590;
Bodkin v. *Edwards*, 255 U. S., 221.

No formal findings of fact were made by either court, but in the opinions in both courts, the facts as they were deduced from the evidence were set forth.

The Circuit Court of Appeals expressly stated that it was in accord with the trial Judge on the issue of infringement (Rec., Vol. III, p. 1658).

The facts on this issue are set forth by Judge THOMPSON on pages 1647-1648, Volume III of the Record.

POINT III.

On the issue of unfair competition, the Circuit Court of Appeals placed its decision upon the "manner" in which it found petitioner had exercised its admitted right to duplicate respondent's preparation and offer it to the trade in competition with the latter. What the Circuit Court of Appeals found to be the facts on this issue, are directly at variance with the facts found by the trial Judge (Cf. Rec., Vol. III, pp. 1658-1659 with pp. 1648, 1650). Neither court saw or heard the witnesses. The case was tried on depositions taken out of court. Under similar circumstances this Court itself has analyzed the evidence and drawn its own conclusions of fact as a basis for its decision.

In *Panama R. Co.* v. *Napier Shipping Co.*, 166 U. S., 280, where after a second appeal had been taken to the Circuit Court of Appeals after reversal of the District Court, the Supreme Court in the exercise of its supervisory jurisdiction, issued a writ of certiorari to bring up the whole record, and *held* that upon such writ the entire case is before it for examination.

In this case the libel was dismissed in the District Court. On appeal, the Circuit Court of Appeals reversed the case to ascertain damages, which were assessed and final decree entered. A second appeal was taken to the Circuit Court of Appeals, which affirmed the decree.

It was argued that the Supreme Court was limited to the question of damages, but the Court held that it would be giving too narrow a construction to its powers to hold that it was intended to bring before the Court

only the question of damages, when it appeared that the petition for the writ of certiorari set forth the facts of the case and claimed that upon these facts the libel should have been dismissed.

The Court said (p. 284):

> "A difference of opinion existed in the court below upon the question of liability and the writ was granted to review the whole case, * * * . But while the [Circuit] Court of Appeals may have been limited on the second appeal to questions arising upon the amount of damages, no such limitation applies to this court, when, in the exercise of its supervisory jurisdiction, it issues a writ of certiorari to bring up the whole record. *Upon such writ the entire case is before us for examination.*" (Italics ours.)

In *Adams* v. *Cowen*, 177 U. S., 471, this Court on certiorari affirmed a judgment of the Circuit Court of Appeals which reversed a judgment of the District Court dismissing the bill of complaint. The District Court and the Circuit Court of Appeals were not agreed as to the facts. On certiorari from the Supreme Court, the judges divided equally and the judgment was affirmed (174 U. S., 800). On rehearing the judgment was again affirmed (177 U. S., 471).

On the last hearing, the Supreme Court certainly did analyze the evidence, agreed with the Circuit Court of Appeals and rendered a decision by a divided court of 5 to 4, affirming the Circuit Court of Appeals.

In the case of *Adams* v. *Gilliland*, 242 U. S., 350, this Court reversed the decree of the Circuit Court of Appeals, which had reversed a decree of the District Court in favor of the plaintiff, sustaining the claim for infringement of a patent.

It appeared that in a previous suit, the District Court gave the plaintiff a decree after hearing evidence of both plaintiff and defendant. In the later suit, upon taking

additional evidence the Court again decided in favor of the plaintiff.

The Circuit Court of Appeals treated the action of the district judge as a mere yielding to the authority of the former decision and *reversed the decree upon the evidence as it stood in print.*

The Supreme Court was unable to agree with the Circuit Court of Appeals.

The Court said (pp. 352-353):

> "There is no doubt that the defendant had castings made. The essential question is the time when they were first made. We shall not discuss the evidence of those concerned in the making beyond recurring to the impression that the witnesses made upon the District Judge and mentioning that a dray ticket relied upon as fixing that date appears to have been open to grave suspicion from its character, marking and other details. Considering that a patent has been granted to the plaintiff the case is pre-eminently one for the application of the practical rule that so far as the finding of the master or judge who saw the witnesses 'depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.' *Davis* v. *Schwartz,* 155 U. S., 631, 636. * * * Upon these considerations and a review of the evidence we are of opinion that the decree must be reversed."

POINT IV.

The facts and the law upon the issue of unfair competition are so interwoven that it is necessary for this Court to analyze the evidence in order to determine whether or not the Circuit Court of Appeals erred in reversing the District Court, as charged by the petitioner.

The issue of unfair competition is always a mixed question of fact and law, and the conclusion of law can only be determined after a careful analysis of the facts.

Had the District Court made specific findings of fact establishing fraud and the Circuit Court of Appeals affirmed the judgment, a very different question would have been presented. Then there would arise a case of concurrent decisions by two courts and this Court would be limited to the single question whether clear error was shown, or whether the action of the lower courts was arbitrary, or transcended the legitimate bounds of their authority.

In view of the circumstances under which the writ of certiorari in this case was applied for, the whole case is before the Supreme Court on the record upon which eminent judges have differed, and this Court has the power to review the evidence, for by that method alone is it possible to determine the issue of unfair competition.

An analogy is found in the rules concerning the review in this Court of the decision of a State court, where the conclusion of law as to a Federal right and the findings of fact, are so intermingled as to make it necessary to analyze the facts in order to pass upon the Federal question.

Such a case was *Jones Natl. Bank* v. *Yates*, 240 U. S., 541, where no findings of fact were made by the Supreme Court of the State. It was declared that the opinion could not be regarded as embodying findings.

The Court said (pp. 552-553):

> "In this state of the record, for the purpose of determining whether in thus reversing the judgment and depriving the plaintiffs of their recovery, the Federal question was wrongly decided, there are two questions to be considered *(a)* whether the facts found by the trial court justified a recovery under the Federal law and, if so, *(b)* whether there was substantial evidence to support these findings, as the duty to decide the Federal question in its very nature involves this further inquiry." (Citing cases.)

In *Truax* v. *Corrigan*, 257 U. S., 312, TAFT, C. J., said (p. 324):

> "In cases brought to this court from state courts for review, on the ground that a federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted federal right has no basis in point of fact or has been waived or lost, this court as an incident of its power to determine whether a federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here" (citing cases). *"Another class of cases in which this court will review the finding of the court as to the facts is when the conclusion of law and findings of fact are so intermingled as to make it necessary, in order to pass upon the question to analyze the facts."* (Citing cases.) (Italics ours.)

POINT V.

The Circuit Court of Appeals erred in holding that the manner in which petitioner marketed its product Quin-Coco in competition with respondent's Coco-Quinine was unfair.

The Circuit Court of Appeals first asserted that

> "the defendant, realizing that the plaintiff had no exclusive right to the formula of its preparation, duplicated it by a preparation of its own and offered it to the trade in competition, *as it had a right to do*" (Rec., Vol. III, p. 1658).

But then the Court takes exception to the *manner* in which the defendant exercised its admitted right, describing this manner in the following language:

> "The defendant first procured samples of the plaintiff's preparation. Learning its ingredients, it then proceeded to make the same preparation. Its efforts were expended not so much in making a compound that would act like that of the plaintiff as they were in making a compound that would look like it and taste like it. It did not show the concern for the use of chocolate as a medium of color and taste that it showed in finding a chocolate that would give to its mixture the color and taste of the plaintiff's. In its laboratory it conducted experiments with chocolates of different kinds in an effort to get the precise color and taste derived from the chocolate used by the plaintiff. For a time it was not successful, but eventually it succeeded. It then placed the product on the market" (Rec., Vol. III, p. 1658).

If the facts were as thus recited, nevertheless, it is submitted, the petitioner was entirely within its rights in following the course described.

In the District Court, Judge THOMPSON, referring to this claim, said that in order that plaintiff should succeed, it must debar the defendant

> "not only from the use of the color, but from the use of the flavor of chocolate. In support of this proposition, the plaintiff has not cited any authorities, and I think the obvious reason is that there are none, to the effect that flavors, and particularly such a distinctive flavor as chocolate, may, because adopted by the plaintiff, be monopolized. While the plaintiff has shown that other liquid preparations of quinine with the bitterness disguised and flavor added may be made, it has not shown that the chocolate flavor may be obtained by any other means than by the use of chocolate, or that chocolate flavor may be used without producing the chocolate color in the liquid. While the distinctive flavor of chocolate is a matter of common knowledge, it is equally a matter of common knowledge that it is a flavor which appeals to the palate and taste of people almost universally.
>
> "Plaintiff is confronted at first with this proposition: That it has no exclusive right to the use of its formula. Its only right is to prevent anyone from obtaining or using it through a breach of trust or contract, and anyone that came honestly to the knowledge of it could use it without the plaintiff's permission and against its will. *Chadwick* v. *Covell,* 151 Mass., 190.
>
> "The ingredients of which its product was composed are of such common every-day use that the plaintiff cannot be held to have the right to prevent others from using the same combination as used by it, and the preparation may be used and manufactured by anyone who in good faith acquires knowledge of its composition and such person may publish the fact that he has made it in accordance with the original formula. *Hostetter* v. *Fries,* 17 Fed., 620" (Rec., Vol. III, pp. 1648-1649).

Chocolate used not only for color but for flavor.

The evidence clearly shows that chocolate or cocoa, which is merely chocolate from which some of the fats have been removed, is not only used to give distinctive color, but also to add to the pleasant taste of the mixture, and furthermore, it aids to some extent in holding the quinine in suspension (Beringer Rec., Vol. III, p. 1507).

Use of Chocolate as disguise for Quinine practiced years before respondent made its preparation.

The evidence further established beyond controversy that the use of chocolate as a disguise or excipient in the administration of quinine was known and employed for many years before plaintiff devised or put upon the market its product known as Coco-Quinine. In 1851, in a work entitled "New Remedies," by Robley Dunglison, published by Blanchard & Lea, typical prescriptions were given for the production of powders composed of sulphate of quinine and chocolate (Rec., Vol. III, p. 1264).

In 1861, prescriptions for a paste composed of quinine and chocolate were published in the "Allgemeine Pharmacopoe," by Dr. F. L. Strumpf, the publisher being C. F. Winters, of Leipsic and Heidelberg (Rec., Vol. III, p. 1264).

In 1868, the American Journal of Pharmacy (Vol. 40), advertised a syrup of chocolate as an excipient for the administration of quinine (Rec., Vol. III, p. 1265). The Druggists' Circular and Chemical Gazette, published in New York in 1871, advertised a formula of a French physician, Dr. Heuze, for the preparation of an extract of Peruvian Bark possessing no unpleasant bitter taste and mixed with pure chocolate paste "so as to form a readily potable, and at the same time an agreeably dietetic medicine."

In February, 1872, the same Journal contained the following statement:

> "Cocoa or chocolate, if the quinia sulphate is not in large proportion, conceals the taste to a great extent, provided it be used of a sufficient strength as in the solid or semi-fluid state" (Rec., Vol. III, p. 1266).

In 1879, The National Dispensary stated:

> "Chocolate also forms the basis for exhibiting iron and other medicinal substances, and has been proposed as a pleasant vehicle in the preparation of lozenges containing santonin, etc." (Rec., Vol. III, p. 1511).

In the decade between 1880 and 1890, Caswell & Company in New York manufactured quinine chocolate lozenges or tablets which had a large sale (Rec., Vol. III, p. 1512).

Henry C. Blair, a well-known retail druggist in Philadelphia, testified that his drug store had sold tablets called "Yerba-Chocolates" since the Centennial Exhibition in 1876. He could not say how long before that time, but continuously ever since. These tablets contained some form of quinine, also chocolate and yerba santa. That prior to 1895, he had compounded a liquid preparation of chocolate, yerba santa and quinine, making a syrupy mixture, on the prescription of Dr. Samuel K. Ashton, of Philadelphia (Rec., Vol. III, pp. 1558, 1559).

The foregoing evidence, which was entirely undisputed, demonstrates that respondent's claim that its preparation of chocolate and quinine known as Coco-Quinine was unknown to the pharmaceutical world at the time when respondent first compounded it is unfounded. Chocolate is not used to destroy the bitterness of quinine, that office being performed by yerba santa, but to impart an agreeable flavor to the mixture, which otherwise would be unpalatable.

The following are the names of the fourteen concerns that have marketed a sweet syrup of Quinine and Chocolate, and the names of their articles and some of their earlier dates when marketed:

"Syrup Quinine, with Chocolate," H. K. Mulford Co., Philadelphia; first made, 1902;

"Wampole's Chocolate Quinine," Henry K. Wampole Co., Philadelphia;

"Quin-Choc," First Texas Chemical Manufacturing Co., Dallas, Texas; first made, 1910;

"Koquin," John T. Milliken & Co., St. Louis, Mo.;

"Chocolate Quinine Syrup," Tilden Company, New Lebanon, New York, and St. Louis, Mo.;

"Quinico," Meyers Bros. Drug Company, St. Louis, Mo.; first made, 1905;

"Chocolate Quinine," Burrough Bros., Baltimore, Md.;

"Quin-coco-ine," Harvey Company, Saratoga Springs, N. Y.; first made, 1909;

"Chocolate Syrup Quinine," Webster-Warnock Co., Memphis, Tenn.; first made, 1910;

"Cocoa & Quinine Comp.," Henry S. Wampole Company, Baltimore, Md.; first made, 1912;

"Choquin," William S. Merrell Chemical Co., Cincinnati (Rec., Vol. III, p. 1207).

Other witnesses testified that there were numerous makes of Chocolate-Quinine on the market.

The respondent did not invent any new product or decoction which it put upon the market and to which it had an exclusive right, but it utilized knowledge which was open to any and everyone to secure and which was open to petitioner as well as to respondent. "Admittedly," says the Circuit Court of Appeals, "the plaintiff has no monopoly in its formula, nor has it an exclusive right to the use of any of its ingredients." The respondent first began the preparation of its mixture in 1899 (Rec., Vol. I, p. 8). In making this preparation, chocolate was

used to furnish a satisfactory color and flavor (Rec., Vol. I, p. 43). Francis, one of respondent's witnesses, for 23 years pharmaceutical chemist with the well-known firm of Parke, Davis & Co., testified that the utility of chocolate or cocoa in such preparation would be that it serves the purpose of imparting "a distinctive flavor and a distinctive color" (Rec., Vol. I, p. 57).

The petitioner—and all others—the Circuit Court of Appeals correctly holds—was "free to duplicate the plaintiff's preparation and enter the trade in competition * * * ."

History of Petitioner's Quin-Coco.

In 1906, Pfeiffer Chemical Company, a St. Louis concern, first made and sold a compound known as Quin-Coco (Rec., Vol. III, p. 1196). In June, 1906, the Pfeiffer Chemical Company became affiliated with Searle & Hereth Company, also a St. Louis concern (Rec., Vol. III, p. 1228). Quin-Coco, being a pharmaceutical preparation, was then transferred to the Searle & Hereth list, and Pfeiffer Chemical Company discontinued its pharmaceutical line (Id.). Searle & Hereth Company made and sold Quin-Coco until some time after this petitioner was incorporated (July, 1908), after which petitioner became the distributing company, but Searle & Hereth continued to manufacture all the Quin-Coco at its laboratories in St. Louis. In March, 1909, Searle & Hereth Company manufactured the first lot of the product at Philadelphia. Thereafter it was manufactured by it in Philadelphia (Rec., Vol. III, p. 1494).

It is the practice of Searle & Hereth Co. to buy chocolate in barrels of about three hundred pounds each, which is used just as it comes. No efforts are made to standardize the cocoa in the making of Quin-Coco, and there are variations in color in different batches; nor is there any effort to imitate the taste of chocolate (Rec., Vol. III,

p. 1497). It hardly requires any testimony to demonstrate the effect as a flavor of the use of chocolate in a medicinal preparation, nor can there be any need of expert testimony to establish the effect upon the eye of the introduction of chocolate considered as a coloring matter alone.

Certain statements in the opinion of the Circuit Court of Appeals as to Petitioner's acts in the preparation and method of sale of Quin-Coco are contrary to the weight of evidence.

The Court stated that the petitioner, when it began to market Quin-Coco, etc., first procured samples of the plaintiff's (respondent's) preparation. "Learning its ingredients, it then proceeded to make the same preparation. Its efforts were expended not so much in making a compound that would act like that of the plaintiff (respondent) as they were in making a compound that would look like it and taste like it."

The evidence does not support this statement, but shows the facts to be to the contrary. The defendant corporation was not organized at Philadelphia until July, 1908. As early as 1906 the Pfeiffer Chemical Company had begun to manufacture and market Quin-Coco at St. Louis. This was two years before the petitioner was chartered. It was afterwards placed on the list of Searle & Hereth Company (being a pharmaceutical). After the petitioner was incorporated, July, 1908, Quin-Coco was shipped by the Searle & Hereth Company from its St. Louis laboratory to Philadelphia to be marketed by the petitioner. This continued until March, 1909, when the Searle & Hereth Company began to make its Quin-Coco at its Philadelphia laboratory; the petitioner acted and has ever since acted only as the sole distributor for East and West.

Therefore, there was no need in 1908 or thereafter (as stated by the Circuit Court of Appeals) for the petitioner to "procure samples" or "learn the ingredients" of Coco-Quin or "conduct experiments" with chocolates of different kinds in an effort to get the precise color and taste of Coco-Quinine. "Experiments" could not have been "at first unsuccessful," as stated by the Circuit Court of Appeals, because none was made. The article had been on the market for over two years. The petitioner has never manufactured it. It is now a Searle & Hereth article and always has been.

Again, the Circuit Court of Appeals states in its opinion that when the petitioner placed Quin-Coco on the market "it did not send its salesmen to prescribing physicians, presenting to them the merits of the preparation and soliciting their favor in prescribing its use as did the plaintiff, but it sent its salesmen directly to druggists, the retail dealers, etc., etc."

The evidence on this point also establishes the contrary to the foregoing statement.

Mr. G. A. Pfeiffer, treasurer and general manager of petitioner, testified (Rec., Vol. III, p. 1200), that their salesmen regularly call on all the retail drug trade and dispensing doctors (doctors who supply their own drugs to their patients), that about one-sixth of petitioner's sales of pharmaceutical preparations is sold to dispensing druggists (Rec., Vol. III, p. 1209).

The respondent's salesmen likewise called on all of the druggists and took orders. The only difference in their business method was that the goods when ordered by the druggists were charged to the local jobber.

The statement in the opinion of the Circuit Court of Appeals, that petitioner's salesmen would at times pour both mixtures on paper to demonstrate the identity of color, is hardly supported by evidence of only two or three instances out of three or four calls a year for ten years

on over 50,000 druggists by about eighty salesmen of the petitioner. It really runs up to over 100 million calls.

The statement by the Circuit Court of Appeals that petitioner in its efforts to produce a compound like Coco-Quinine did not show the same concern for the use of chocolate as a medium of color and taste as it showed in finding a chocolate that would give to its mixture the color and taste of the respondent's, is not supported by the evidence.

Groves, a former employee of petitioner, who, when he testified, was an employee of respondent, testified that experimental work on this product, conducted in the laboratories of the petitioner during the latter part of 1908, was directed to making a product similar in color to that of the Lilly product; that the experiments at first were not a success, but after receiving a formula from the Pfeiffer Chemical Co. at St. Louis, they produced a product of the same color as that which they were endeavoring to duplicate, namely, Lilly's Coco-Quinine (Rec., Vol. I, pp. 360-362). This testimony was denied by Harry Fritsch, foreman of petitioner's Wet Goods Department, engaged in the manufacture of its liquid preparations, who also testified:

> "When it comes to difference in color, there were no experiments made, therefore we could not compare any colors."

Fritsch further testified that no steps were taken to standardize the precise color of the cocoa that goes into the Quin-Coco preparation (Rec., Vol. III, pp. 1494-1498).

But all this testimony was directed towards what happened in the Philadelphia Laboratory of Searle & Hereth in 1908. The testimony, however, is conclusive, as above shown on page 28 of this brief, that Quin-Coco was manufactured by Searle & Hereth in St. Louis in 1906 and continuously thereafter until Petitioner was

organized in July, 1908. After that it was made both in Philadelphia and St. Louis, but solely by Searle & Hereth. There was, therefore, no occasion for Petitioner to experiment to produce this article, as they did not manufacture it.

As a matter of fact, in the Court below, respondent laid little stress upon this contention. Its main contention and the principal basis of the decision of the Circuit Court of Appeals was, that petitioner in selling its product to druggists, through its salesmen, represented that it could be passed off as the product of respondent; that as a matter of fact it was indistinguishable in appearance from that of respondent, and that as it cost less than respondent's product, druggists were tempted to dispense it when that product was prescribed, and that petitioner was responsible on the evidence for that fact that some druggists did so dispense it.

Testimony that in two or three instances salesmen poured Coco-Quinine and Quin-Coco into a dish to demonstrate their similarity in color and appearance, does not sustain a finding that petitioner in making the preparation Quin-Coco strove primarily to give it the same color and taste as that of Coco-Quinine.

IT IS NOT CLAIMED THAT PETITIONER SOLD ITS PRODUCT QUIN-COCO IN BOTTLES MADE OR LABELLED TO RESEMBLE THOSE IN WHICH RESPONDENT SOLD ITS COCO-QUININE. NOR WAS SUCH THE FACT.

All of the bottles of Coco-Quinine manufactured and sold by respondent bear a label on which is printed a representation of a factory with the word "Lilly" in red script, this being a facsimile of the signature of the founder of respondent's house and a registered trademark on all labels affixed to the goods emanating from its laboratories, and they advertise their product in the words, "If it bears a red Lilly, it's right." The name

of the corporation, The Eli Lilly & Company, appears with these trade-marks on all packages (Rec., Vol. I, pp. 50-51).

W. S. Cavedo, one of respondent's witnesses, a retail druggist of Richmond, Virginia, testified, that when inspecting a bottle of Coco-Quinine, he always knows it by the label, that " 'Eli Lilly & Company' is right on the bottom of the label printed in red," and to his eye, that is distinguishing as indicating a Lilly product (Rec., Vol. I, p. 328). A. B. Garber, another of respondent's witnesses, a druggist from Emporia, Virginia, testified to the same effect, as did Van Schaak, representative of a large jobbing house in Chicago, who testified:

> "As far as I personally know, all of their products are identified by that trade-mark, printed on the labels or wrappers, or both.
>
> "XQ18. The name so printed has a very considerable currency in the trade, has it not? I mean as a trade name. A. Yes" (Rec., Vol. I, p. 75).

There is not a syllable of evidence to suggest that petitioner has used a label similar to that employed by respondent, or so bottles its product as to deceive any person into confusing the two products by leading him to believe that the bottle containing the product of defendant is in fact that of plaintiff. Compare Complainant's Exhibit Bottle No. 4 (Coco-Quinine) with Complainant's Exhibit Bottle No. 5 (Defendant's Quin-Coco).

POINT VI.

The Circuit Court of Appeals erred in holding that because of representations made by salesmen of petitioner in selling Quin-Coco, petitioner became a party to frauds practiced by retail druggists in passing off its product upon customers who ordered and thought they were getting respondent's Coco-Quinine.

"That Coco-Quinine and Quin-Coco were substantially identical products; that Quin-Coco could be purchased at a saving upon the price of Coco-Quinine; that it could be placed upon the market as a substitute for Coco-Quinine," were, substantially, the representations of petitioner's salesmen—matters which the District Court, it is submitted, properly held under the law petitioner had a right to represent to its customers.

The added charge made by the Circuit Court of Appeals, that petitioner systematically sought to promote sales by suggesting to retail druggist purchasers that they could, without fear of detection, pass off Quin-Coco for Coco-Quinine, when the latter was called for, while charged by certain of respondent's witnesses, was denied in every instance by the impugned salesman, and the testimony to that effect is far too inconclusive to afford a sound basis for the conclusion reached by the Circuit Court of Appeals.

Specifically, the Circuit Court of Appeals found that petitioner

> "did not send its salesmen to prescribing physicians, presenting to them the merits of the preparation and soliciting their favor in prescribing its use as did the plaintiff, but it sent its salesmen directly to druggists, the retail dealers, and represented to them that its new product, Quin-

> Coco, is the same as the plaintiff's Coco-Quinine (referring to the latter by trade name and maker's name); that when Coco-Quinine is prescribed by a physician or asked for over the counter by a customer, Quin-Coco could be 'substituted without detection' and 'without anyone being the wiser.' Salesmen would at times pour both mixtures on paper to demonstrate the identity of colors. To induce druggists to make purchases, the defendant represented that substitution of Quin-Coco for Coco-Quinine was not only practicable but profitable because Quin-Coco was cheaper" (Vol. III, p. 1658).

This practice of the salesmen of defendant-petitioner the court found was

> "fully established by the evidence of an unusual number of witnesses, and that the practice, followed by its salesmen with the sanction of their superiors, was so general that the defendant is charged with knowledge of it and is, accordingly, answerable for it in the measure prescribed by law" (Rec., Vol. III, pp. 1658-1659).

Judge THOMPSON, in the District Court, says of the same evidence as that upon which the Circuit Court of Appeals bases these conclusions, which evidence Judge THOMPSON states has been carefully examined, that

> "In a charge of this nature, the testimony should be direct, clear and positive. But the testimony in most of instances consists rather of impressions of the witnesses as to what the defendant's salesmen meant than of statements of what they said. The answers of the witnesses upon the point of suggestions by defendant's salesmen of passing off were in many instances produced through objectionably leading questions. In substantially every instance in which unfair selling methods were attributed by the witnesses to the defendant's salesmen, the salesmen, upon being called, denied having made any such suggestions.

> "The plaintiff has failed to establish the fact that the general officers or sales managers of the defendant authorized, advised, encouraged or suggested the alleged unfair selling methods on the part of its salesmen. That Coco-Quinine and Quin-Coco were substantially identical products; that Quin-Coco could be purchased at a saving upon the price of Coco-Quinine; that it would be placed upon the market as a substitute for Coco-Quinine were all matters which under the law the defendant had a right to represent to its customers. In view of the fact, which I find established under the evidence, that no officer or sales manager of the defendant authorized or instructed the salesmen in unfair selling methods, in view of the unsatisfactory testimony upon which unfair selling methods of the salesmen is charged, and in view of the positive denials of any such acts on the part of the salesmen, it is concluded that the plaintiff has failed to establish its right to a decree based upon unfair selling methods" (Rec., Vol. III, pp. 1650-1651).

In view of this marked difference between the conclusions deduced from the same evidence by the two courts, the attention of this Court is invited to the evidence itself.

The Inherent Improbability of the Respondent's Case.

The petitioner is one of the large manufacturing drug houses in this country. It has the William R. Warner & Company business, which has been in existence in Philadelphia for more than 50 years, and the Searle & Hereth and Pfeiffer Chemical Company business. It has also the Sloan's Liniment and the Bucklen businesses (Pfeiffer, Vol. III, p. 1196). Since this case began, it has taken over the Hudnut Perfumery business in New York (Nottingham, Vol. III, p. 1575).

The petitioner's "net sales for 1915 were over $2,600,000" (H. E. James, Vol. III, p. 1542).

It spends over $250,000 a year on its selling force (G. A. Pfeiffer, Vol. III, p. 1200, Q62).

It marketed (1915) 5,000 items (Pfeiffer, Vol. III, p. 1213, Q146).

Experience teaches that a business of this magnitude cannot be built up and carried on except upon correct business principles. It seems to require no proof to show that a drug house would harm its reputation and business if it practices "unfair" selling methods. If any proof were required it is furnished by Dr. Beringer, a prominent and experienced pharmacist and chemist, closely connected with the College of Pharmacy of Philadelphia, who testified that "such a thing would discredit the house represented, and would be a serious injury to their standing and business" (Record, Vol. III, p. 1536, Q113).

The total sales of Quin-Coco by petitioner in 1914 as shown by H. E. James (Vol. III, p. 1542) were $13,000, covering also two other similar drugs. But of this $2,100 were sold on mail orders. The total sales by traveling salesmen were therefore $10,900. This amounted to .0045 per cent. of the total sales of the company.

Assuming a 10 per cent. profit, this would be $1,090 a year for 75 salesmen. Each would earn by his sales an average profit of $13.20 for the house. On a 5 per cent. commission on gross sales the salesman would earn $7.26 a year.

The probability of a large business concern perpetrating on the public a general business fraud as charged by the Circuit Court of Appeals seems so slight it would be almost unthinkable. Experience teaches that big men with a great property at stake do not commit petty frauds.

COXE, Dist. J., pertinently said in *Hostetter Co.* v. *Comerford*, 97 Fed., 585, 586:

> "Again, there is nothing in the record to indicate that the defendants are men who would descend to the level of the petty trickster. For aught that appears they are men of fair standing in the business in which they are engaged. The burden is strongly upon the complainant to prove fraud by a fair preponderance of evidence. This it has not done. Stated as fairly as the complainant can expect, the matter is involved in doubt. Should the court decree for the complainant it would be still harassed by the fear that it may have condemned innocent men."

Again, these "unfair" selling methods are charged to have been committed on the retail drug trade. That, too, is quite unthinkable. Consider that trade for a moment. Its morals are "above the average of the ordinary commercial man" (Pfeiffer, Vol. III, p. 1205, Qs. 98-100). Blair, an eminent Philadelphia druggist, testified that the American Pharmaceutical Association had had a Code of Ethics for more than fifty years, drawn up "on a very high moral standard" (Vol. III, p. 1558, Q9).

It was revised and republished at the annual meeting of the Association at Cleveland in 1922.* Among its canons are these:

> "Pharmacy has for its primary object the service which it can render to the public in safeguarding the handling, sale, compounding and dispensing of medicinal substances.
>
> The practice of pharmacy demands knowledge, skill and integrity on the part of those engaged in it. Pharmacists are required to pass certain educational tests in order to quality under the laws of our States. The States thus restrict the practice of pharmacy to those persons who by reason of

*Published in Amer. Journ. of Pharmacy, for 1922, p. 703; Amer. Pharm. Apoc. Journ., for 1922, p. 728. The revision of it is not in the proofs, but it seems to be a matter of public knowledge and concern.

special training and qualifications are able to qualify under regulatory requirements and grant to them privileges necessarily denied to others.

In return, the States expect the Pharmacist to recognize his responsibility to the community and to fulfill his professional obligations honorably and with due regard for the physical and moral well being of society.

The Pharmacist should not, under any circumstances, substitute one article for another, or one make of an article for another in a prescription, without the consent of the Physician who wrote it."

To attempt to practice "unfair" selling methods on such a body of men would be largely futile. To suggest it would be to impugn the morals of the whole drug trade, on whose morals human life depends to a certain extent.

The Petitioner's Training of Its Salesmen Was Ethical and Thorough.

The testimony on this point included that of petitioner's officers, sales managers, and the salesmen themselves. One, at least, of the respondent's witnesses was an excellent witness for petitioner in this respect. Without quoting the evidence we will briefly refer to the testimony on this point:

The Officers.

G. A. Pfeiffer, Vol. III, p. 1212, Q143.

H. Pfeiffer, Vol. III, p. 1234, Qs 6 to 22.

G. D. Merner, head of the St. Louis office, Vol. III, p. 1284, Q39, etc.

The Sales Managers.

Ritayik, Vol. III, p. 1303, Q25.

Hagaman, Vol. III, p. 1277, Qs 3 to 11.

McNulty, Vol. III, p. 1252, Qs 9, 10.

The Salesmen.

Richards, Vol. III, p. 1342, Qs 36 to 43; p. 1351, Qs 145 to 149.

Gonzales, Vol. III, p. 1357, Qs 14 to 16.

Moon, Vol. III, p. 1465, Qs 19 to 22.

Jones, Vol. III, p. 1331, Qs 54-56.

Respondent's Witness.

Kelton, Vol. I, p. 98, Qs 24, 25.

THE "SALESMAN'S CONFIDENTIAL."

This was a pocket manual for the use of Warner salesmen. They all received copies of it. It was offered in evidence at page 1236; as to pp. 86 and 87, which were there read into the Record, it taught:

> "It pays to adhere strictly to the truth at all times."
>
> "It don't pay to speak ill of, or even mention, your competitor."
>
> "We believe in honesty and fair dealing."
>
> "Never speak ill of a competitor."

The evidence shows that there are about 53,000 retail druggists in the United States; 73 were examined by the respondent; only 22 gave testimony tending in any degree to support the charge that petitioner's salesmen, in pushing the sale of Quin-Coco, represented that it could be passed off for Coco-Quinine, and substantially all of these, upon cross examination, narrowed the testimony down to a representation that Quin-Coco was the same as Coco-Quinine, and could be sold for the same uses. Out of more than 300 salesmen employed by defendant during the ten years covered by the evidence, charges of improper representation were made against only about ten. Many of these were single instances in the selling work of salesmen who for years had visited from 400 to 1,000 drug stores three or four times a year. Every salesman, except one, whose mind had so failed that he could

not be called, specifically denied the charges against him, and testified to entirely proper selling methods on his part. All of the officers and sales managers of the petitioner corporation categorically denied any authorization, knowledge or approval of the alleged dishonest practices.

Respondent's Witnesses on "Unfair" Trade Were Stale.

The respondent's witnesses as to "unfair" trade were all or nearly all stale, especially considering that they were called only to testify *as to what had been said* to them respectively by a Warner salesman in soliciting their trade in Quin-Coco, *i.e.*, to repeat oral statements made to them.

The English rule on this subject is very strict. See, for example, *Carr & Sons* v. *Crisp & Co., Ltd.*, 19 Rep. Pat. Cas., 497, where the Chancery Division of the High Court (per BYRNE, J.) laid down the principle that in "passing off" cases, which depend substantially on oral testimony only (p. 499),

> "it is only fair that if it is intended to take proceedings those proceedings should be taken as quickly as possible, so that warning may be given to the defendants that certain transactions are going to be called into question before the memory grows dull with reference to such transactions" (p. 502).

Another case is *Ripley* v. *Griffiths*, 19 Rep. Pat. Cas., 590, where Mr. Justice FARWELL, speaking for the same Court, said (p. 597):

> "To say that anybody can possibly recollect the sale of one halfpenny cake of blue, weeks after, or even days after, seems to me to be almost preposterous."

See, to the same effect, *Lever Bros., Ltd.*, v. *Masbro' Equitable Pioneers Society, Ltd.*, 29 Rep. Pat. Cas., 225 (C. A.). In this case it appeared that in July, 1910, the

plaintiff sent boys to the defendant's shop to buy the plaintiff's soap. In most instances the defendant's salesmen sold to the boys the defendant's soap without explanation. The plaintiff began his action on August 5, 1910, and served the statement of his claim in December, 1910. The trial did not occur until October, 1911. In the meantime the clerks involved had left the employ of the defendant. The Court of Appeal took the position that the defendant's attention should have been called to the facts within a day or two after each occurrence, so that each transaction could have been inquired into and the shopmen confronted with the trapper. The shopmen, when called, could not remember the trapper or the transactions, and could only say generally what their sales practice was and what they would have said if they had received requests for the plaintiff's brand. The Court went on to characterize as *"rather ludicrous"* the argument that upon such facts the Court should accept the testimony of the trappers as correct and uncontradicted.

The following is a table of fifty-six of respondent's witnesses, showing the respective periods that had elapsed since the interview to which the witness testified as the occasion on which a salesman had *spoken* to witness about Quin-Coco; or, in the case of petitioner's former salesmen (here testifying for respondent), since the time at which each received his selling instructions to which he here testified.

Vol I. of Record Page	*Witness*	*When Examined*	*Period Since Interview*
15	Hooper	March 22, 1915	3 years and over
60	Merithew	" 24, "	18 to 12 months
68	Wright	" " "	No date stated*
77	Wolsey	" 29, "	3 or 4 months
81	Kinder	" 30, "	No date stated*
94	Kelton	" " "	Over 2 years

*A witness who is called to testify as to what was *said* at an interview deemed by plaintiff to be important, and who does not give, or is not asked to give, the date, or who says he "does not remember it," is entitled to small credit or none.

Vol. I of Record Page	*Witness*	*When Examined*	*Period Since Interview*
113	Scott	March 30, 1915	5 months, also 3 mos.
165	Prochnow	April 3, 1915	3 months as to Richards, 2 or 3 yrs. as to Gill
177	Porter	" 5, "	6 or 7 years
179	Barnes	" 5, "	Don't remember date
201	Heno	" 6, "	3 or 4 years
210	Ray	" 7, "	3 or 4 years
217	Ames W.	" 8, "	Dont' remember
233	Stoval	" " "	No date stated
244	McMillan	" 9, "	1 month
272	Reid	" 13, "	3 years
285	Jolly	" 14, "	"Inside 6 months"
358	Groves	June 3, "	7 years
369	Hardy	" 5, "	7 years
377	Garner	July 12, "	5 or 6 years
387	Whiteley	" 12, "	4½ years
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418	Ege	June 28, 1916	4½ years
422	Weber	" 28, "	5 years and 1 month
429	Lebo	" 28, "	4½ years ago and during 4 years prior to that
435	Bell	" 28, "	Can't approximate date. Lebo, his clerk, says 4½ years
445	Peabody	" 29, "	5 years or more
478	Willis	Aug. 7, 1916	No date stated
481	King	" 7, "	3 years and 7 months at least
505	Greene	" 8, "	4 or 5 years
515	Kuhn	" 9, "	10 years
523	Blodau	" 10, "	4 years about
530	White, Elzie	" 12, "	5½ years
540	Walker	" 12, "	5 1/3 years

Vol. II of Record Page	*Witness*	*When Examined*	*Period Since Interview*
548	Culver	Aug. 14, 1916	2 years since last call. He called for 8 years.
558	Stuckey	" 14, "	3 to 4 years. Last call 2 yrs.
639	Edmondson	" 14, "	about 3 years,
641	Moise	" 15, "	1 year, 4 months, but Heno says 3 to 4 years
658	Perrine	" 17, "	8¾ years
665	Seegar	" 17, "	Date not stated
679	Sinclair	" 19, "	7 to 8 years
681	Powell	" 19, "	7 years
689	Lavison	Oct. 23, "	8 years
713	Odell	" 26, "	6 years
720	Van Dale	" 26, "	7¾ to 8¾ years
730	Heim	" 26, "	"During 1915"
734	Kissell	" 26, "	3 years and at intervals as to Rogers. 2 years as to Starring
750	Grimaldi	" 28, "	4 to 5 years
757	Peabody	" 30, "	5 years and 7 months
774	Groves	" 30, "	7 years
797	Green, F. E.	Nov. 27, 1916	3 years and 5 months
806	Thurman	" 27, "	9 years
918	McCorkle	Jan. 15, 1917	1 month about
925	James, L. S.	" 15, "	8 months
973	O'Connell	Nov. 8, 1917	2 years
1111	Weldon	Dec. 3, 1917	4 years
1170	Hilton	Dec. 5, 1917	4 or 5 years

The respondent's case itself may be said to have been stale. Enough so to cast discredit on it.

The petitioner began to market Quin-Coco after July, 1908. Before that, for two years, it had been marketed by Searle & Hereth. During that period it came into competition with the numerous sales force of respondent. It is fair to assume that the respondent knew its own business and that its salesmen had become aware of this competition. Lynn, respondent's present general manager, was examined and seemed to deny knowledge, but he was not at that time an officer of the respondent. Mr. Lilly himself, who could have given us the fact, was not questioned about it.

See Lynn, Vol. II, p. 1098, XQ25, etc.

On August 31, 1909, the respondent wrote to the petitioner requesting it to *raise its prices* on this article to correspond with the respondent's prices, while saying "that it would probably be asking too much to make the request that you (the petitioner), discontinue this preparation."

On January 1, 1910, the respondent by letter requested the petitioner to *change the name* of its article and *raise its price.* Nothing resulted from this correspondence. It contained no complaint of "unfair" selling methods.

The bill of complaint was not filed until December 22, 1914. It does not appear that during that period the respondent called the attention of the petitioner to "unfair" selling methods on the part of the petitioner's salesmen. In fact, the bill itself was the first complaint. And in this connection it should be borne in mind that the respondent had 140 travelling salesmen who called on the entire drug trade several times a year. The respondent certainly did not lack the means of investigating thoroughly the petitioner's selling methods.

(These letters will be found in Vol. III, pp. 1214 to 1220.)

A careful analysis of the evidence shows the follow. the facts:*

(a) *Eight retail druggists testified on behalf of Respondent that Petitioner's salesmen represented merely that Quin-Coco was the same as Coco-Quinine, and cheaper in price, which was true.*

(1) KNOWLES, a retail druggist of Saginaw, Michigan, testified that a representative of petitioner stated to him that he was foolish to pay $4.80 for a gallon of Coco-Quinine, when he could use his product at a cheaper price for dispensing purposes and also to sell on call for Coco-Quinine or chocolate quinine, syrup of quinine, or where the syrup of quinine is called for (Rec., Vol. I, p. 66). On cross examination, being asked to state the exact words used by the salesman, he said:

> "A. He took a sample of Quin-Coco from his grip and asked me if I handled that product. I said 'No, I have always used Coco-Quinine for all such calls.' He said 'Well, don't you think you could handle this to your advantage.'"

ROGERS expressly denied Knowles' statements. "I will say that I never had that conversation with Knowles" (III, Qs 65 to 68).

As Knowles was uncertain as to the name of the salesman, Starring was called and said that he sold Knowles one gallon "but no special mention was made of Quin-Coco" (III, p. 1433, Qs 61-70).

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*HOW THE PROOFS WERE TAKEN:
The plaintiff's case in chief constitutes Vol. I.
The defendant's answering proofs appear in Vol. III, down to p. 1564.
The plaintiff then put in rebuttal proofs which appear in Vol. II from the beginning to page 940. So far as they appeared to be testimony that properly belonged in the plaintiff's opening case, leave of Court should have been obtained, but was not.
The defendant below then obtained leave of Court to introduce sur-rebuttal proofs. These are in Vol. III, from page 1564 to page 1646.
The leave of Court to introduce sur rebuttal is in Vol. II, p. 941.
Then the plaintiff, without leave of Court, introduced further proofs which appear in Vol. II, pp. 945 to the end.

(2) WRIGHT, a retail druggist of the same place, testified that the representation made to him by petitioner's salesman was that Quin-Coco

> "was a preparation of quinine the same as Coco-Quinine and it was cheaper and we would make more money out of it." That "Warner & Company's representative told me I could sell it the same as Coco-Quinine, there was no distinction" (Rec., Vol. I, pp. 68-69).

The fact that even this statement was made, was denied by the salesman, Rogers (Rec., Vol. III, p. 1448). Wright himself testified that he had sold Quin-Coco when Coco-Quinine was called for in his drug store, but not on prescriptions (Rec., Vol. I, p. 69). He does not state that this was done without explanation to the customer.

(3) BLODAU, a retail druggist of Nashville, Tennessee, testified that the salesman

> "gave me to understand that by the use of this preparation it would be a saving of money for me and why pay the price I did for Coco-Quinine. Naturally the impression to be made on me was that I should use his preparation in place of Coco-Quinine" (Rec., Vol. I, pp. 106-107).
>
> "He did not state that I should use Coco-Quinine dishonestly either on prescriptions or over the counter, but that I could use the same."

This was not "unfair" selling. It was using a certain drug of one make in place of another make.

DE VALL, the salesman, was called (III, p. 1385, Qs 26-32):

> "A. I have never said anything to Mr. Blodau that would leave him under an impression as he states."

(4) MANNING, a druggist of Memphis, Tennessee, testified that petitioner's representative (name not given) introduced Quin-Coco to him

> "as a chocolate quinine identical with the product of Lilly." "That it was the same product as Coco-Quinine." *"That it was much cheaper than Coco-Quinine"* (Rec., Vol. I, pp. 109-110).

(5) ALBRIGHT, a retail druggist of Mobile, Alabama, testified that Quin-Coco had been offered to him "as being the same as Coco-Quinine," the price being considerably lower than Coco-Quinine (Rec., Vol. I, pp. 236-237). This witness never had sold Quin-Coco at his present stores, but had sold it where he was previously employed in response to demands for Coco-Quinine and on prescriptions for Coco-Quinine. He testified that the customers and physicians were not advised that they were getting Quin-Coco instead of getting Coco-Quinine when these transactions were made. This, however, was before 1910 and before his interview with petitioner's salesman, testified to on his direct examination (Rec., Vol. I, p. 241).

JONES, the Warner salesman (III, p. 1320, Q44), had Albright's statement read to him and was asked to state whether "he ever made any proposition to Albright to buy the Quin-Coco and use it for Coco-Quinine."

> "A. I did not, absolutely. I never offered him any pharmaceuticals whatever."

(6) PROCHNOW, a retail druggist of San Antonio, Texas, testified that petitioner's salesman (either Richards or Gill, he could not tell which), who solicited his order for Quin-Coco

> "told me that it was the same preparation as Coco-Quinine and I was foolish for paying more money for it, as his was a good deal cheaper."

He was asked:

> "Q14. Did he say anything about what use you could make of it?
>
> "By Mr. Rawle: Objected to as leading.
>
> "A. He *intended me* to use it instead of Coco-Quinine.
>
> "By Mr. Rawle: The answer is objected to as not stating what the salesman said.
>
> "Q15. What do you mean by 'instead of Coco-Quinine'?
>
> "Same objection as to the last question and as not calling for testimony as to what was said.
>
> "A. When I got a call for Coco-Quinine or a prescription, that it could be used instead." (Rec., Vol. I, pp. 166-167.)

But on cross examination, when asked to give Richards' language, he testified (Rec., XQ21):

> "He (the salesman) said that he had Quin-Coco which was the same thing as Coco-Quinine and he then gave me the different prices * * *.
>
> "XQ22. Do you mean that he didn't say anything more than what you have just stated to me?
>
> "A. He went on and talked about other preparations."

Richards, one of the salesmen referred to, testified he had solicited Prochnow to buy Quin-Coco, telling him that it was the best preparation of its kind on the market (although he never sold him any) but that he had never advised him or any other druggist that he could use Quin-Coco on specific calls for Coco-Quinine or any other chocolate preparation where it is specifically called for (Rec., Vol. III, pp. 1344-1345). On cross examination, Prochnow testified that Gill, one of petitioner's salesmen, said:

> "I would be very foolish for paying the price for Coco-Quinine, that he had an identical preparation and he named the prices, which I don't remember, I don't remember prices" (Rec., Vol. I, p. 168).

GILL, the salesman, had "suffered a lapse of his mental faculties" and could not be called in denial (III, p. 1290, Q94).

(7) NELLIGAR, a retail druggist of Norfolk, Virginia, testified that Moon, one of petitioner's salesmen, in soliciting him to buy Quin-Coco, stated:

> "This is a product identical in composition and physical appearance with 'Coco-Quinine' of Lilly's, but is much more economical."

On cross examination, he stated that Moon exhibited a bottle of Quin-Coco to him each time he visited him, so that he observed the similarity of physical appearance between the two products (Rec., Vol. I, pp. 348-349).

(8) GARNER, a retail druggist of Yoakum, Texas, testified that petitioner's salesman represented Quin-Coco

> "to be the same preparation as Coco-Quinine, at a less price." "That you couldn't tell the difference in the taste, appearance of it, or the color of it, or the action of it."

This witness testified that in response to calls for Coco-Quinine he had labelled Quin-Coco and dispensed it in response to such calls as Coco-Quinine. He did not, however, testify that this was done on the suggestion of petitioner or one of its representatives (Rec., Vol. I, pp. 378-379).

RICHARDS, the salesman, testified (Rec., Vol. II, p. 1345, Qs 60 to 67):

> "A. I have never sold Mr. Garner Quin-Coco since I have been selling goods for the company.
>
> "A. I never said to Garner or in any way gave him to understand that Quin-Coco could be dispensed or used by him for Coco-Quinine."

(b) ***Nine druggists testified on behalf of Respondent that Petitioner's salesmen represented Quin-Coco to be so closely identified with Coco-Quinine that one could be used in place of the other.***

(1) PINK, a retail druggist of Indianapolis, Indiana, testified that a salesman, whose name he did not remember, solicited him to buy Quin-Coco, although he never had bought any.

> "They said that I could use it in place of Coco-Quinine, that there was absolutely no difference, and no one could tell the difference" (Rec., Vol. I, p. 30).

(2) WOLSEY, a retail druggist of Cape Girardeau, Missouri, testified that one of petitioner's salesmen told him

> "he could sell me the Quin-Coco which was the same as Eli Lilly's Coco-Quinine and at a cheaper price. That I could make more money on buying it. That it is the same thing and I could dispense it as the same article" (Rec., Vol. I, p. 78).

On cross examination, when asked to give the exact words of the salesman, he testified:

> "He said 'I would like to sell you a gallon of Quin-Coco. It would be cheaper for you to use than Coco-Quinine and you would make more money off it'" (Rec., Vol. I, pp. 77-78). That is the "entire conversation I had with the Warner salesman."

BROWN, the Warner salesman, denied absolutely Wolsey's statement (Rec., Vol. III, p. 1405, Q16 to end of direct).

(3) KINDER, a retail druggist of the same place, testified that Brown, one of petitioner's salesmen,

> "upon learning that we were using a great quantity of Lilly's Coco-Quinine, he showed us his

> preparation and called our attention to the fact that it was a preparation that we could easily use in the place of Coco-Quinine and save considerable money in our purchases. He stated that his company had by their work on this preparation caused Lilly to thin down their Coco-Quinine syrup in order to meet the efforts Warner & Co. were making. * * * He stated that it had been and was being successfully used wherever Coco-Quinine was having a good sale; that they were identical preparations and could not be distinguished. * * * He simply suggested that we could use it wherever there was a demand for Coco-Quinine, and that it could not be told from Coco-Quinine" (Rec., Vol. I, p. 82).

BROWN, the Warner salesman, denied this statement (Rec., Vol. III, p. 1405). Kinder never received a prescription or call for Quin-Coco (Rec., Vol. I, p. 82), and there was no evidence of any sale.

(4) HENO, a retail druggist of Napoleonville, Louisiana, testified that Mr. Jones, one of petitioner's representatives, had

> "sold me one gallon of Quin-Coco, telling me at the time that it was a cheaper preparation from a financial standpoint than Coco-Quinine, and that physicians were using it all over for Coco-Quinine" (Rec., Vol. I, p. 202).

The witness testified that he had used perhaps three pints out of the gallon he bought, and was stopped by one of his physicians, who objected to his using Quin-Coco, and ordered him to buy Eli Lilly's. Evidently he was not using it without the physician's knowledge.

More than two years later (he testified), Mr. Jones, with another Warner salesman, came on his regular trip and offered the same product, and "said that they had been selling it to physicians and all their trade or customers to take the place of Coco-Quinine."

JONES positively denied the truth of this latter testimony (Vol. III, p. 1328).

(5) RAY, a retail druggist of Brookhaven, Mississippi, testified that he had been solicited to buy Quin-Coco to sell when chocolate quinine was called for and to use in place of Coco-Quinine, if they desired, on prescriptions. He said that Quin-Coco was offered to him, first, by Mr. Howard Smith, and then by Mr. Gonzales, representing petitioner. Being asked to testify to what statements the salesmen made, he said:

> "We were offered the Quin-Coco as an article that we could dispense or sell at a bigger profit than we could the Coco-Quinine by both Mr. Smith and Mr. Gonzales.
>
> "Q11. Was it your understanding of their representations that you could use Quin-Coco to supply the demand for Coco-Quinine?
>
> "By Mr. Rawle: Objected to because the witness has already been asked to state what was said and has answered the question; also as leading; and because the witness' understanding is not evidence.
>
> "A. Yes, sir; that was the understanding."

On cross examination, the witness testified that Smith had said:

> "That we could dispense Quin-Coco when chocolate quinine was called for or when Coco-Quinine was called for at a saving of about a dollar a gallon."

He further testified that he did not believe it would be right for a druggist, when Coco-Quinine was called for, to sell Quin-Coco, without saying anything about it to the customer; that he did not buy Quin-Coco to substitute for Coco-Quinine when Coco-Quinine was called for, but to dispense when chocolate quinine was called for, and to dispense on prescriptions for Quin-Coco.

After further cross examination and re-direct examination, he was finally asked on re-cross:

> "RXQ70. You have said that you always thought that Quin-Coco was put out to take the place of Coco-Quinine. Isn't that what Smith wanted to sell you Quin-Coco for, *to take the place of Coco-Quinine as a chocolate quinine preparation?* A. That is the way I understood it.
>
> "RXQ71. And that is about the substance of what he said to you at these various interviews, isn't it? A. Yes, sir."

On further re-direct, he added that he thought that his statements were as correct as it was possible for him to make them (Rec., Vol. I, pp. 210, 213, 216).

Gonzales, one of these salesmen, specifically denied Ray's statement; said it was contrary to his regular selling methods; and would have been dishonest (III, p. 1363, Qs 79 to 84).

Smith, the other salesman who visited Ray, had left the petitioner's employment and turned up as respondent's witness. We could not call him. Ray said Smith called on him "about 35 or 40 times." As to which call did Ray testify? Of course, Ray's testimony was only as to Ray's *impression.*

(6) Reid, a retail druggist of Union Springs, Alabama, testified that his first knowledge of Quin-Coco came from Mr. McCarthy, one of petitioner's salesmen, some three years previously.

> "Q13. As near as you can recall what did Mr. McCarthy say to you on this subject? A. To the best of my memory, it was about something like this: He asked me if I used very much Coco-Quinine. I told him that I used a good deal. He then said that he could save me some money on the product. He showed me the sample of Quin-Coco and made me a price of $3.50 a gallon, and I bought one gallon.

"Q14. Did he tell you how you could sell it or dispense it, and if so, what did he say?

"By Mr. Rawle: Objected to as leading.

"A. He simply sold it to me as a product to take the place of Coco-Quinine, said that it contained the same amount of quinine and would take the place of Coco-Quinine.

"Q15. In what way would it take the place of Coco-Quinine?

"By Mr. Rawle: Objected to as incompetent.

"A. It would have the same effect, that is Quin-Coco would have the same effect as Coco-Quinine.

"Q16. You have already testified that you never had any demand for Quin-Coco; how did you expect or he expect for you to dispose of Quin-Coco if you had no demand for it?

"By Mr. Rawle: Objected to as leading and as calling for an opinion, and as incompetent.

"A. I gathered from his conversation at the time that I bought it, that I bought Quin-Coco, that I would have to sell it as a substitute for Coco-Quinine.

"By Mr. Rawle: Answer is objected to as incompetent, and also because what the witness gathered from a conversation is not evidence.

"Q17. Do you mean to supply the demand for Coco-Quinine?

"Same objection and as leading.

"A. I do.

"Q18. Did you sell Quin-Coco in accordance with this understanding?

"By Mr. Rawle: Objected to as incompetent and as leading.

"A. Not entirely.

* * * * * * * *

"I sold Quin-Coco usually when I had calls for 'chocolate quinine,' and on a few occasions when I had calls for Coco-Quinine" (Rec., Vol. I, pp. 273-274).

The witness testified that he bought one gallon; that believing Mr. McCarthy's statement that Quin-Coco was

exactly the same as Coco-Quinine, he dispensed it as such. The bottle which he furnished when he did so was labelled "chocolate quinine" (Rec., Vol. I, pp. 276-277).

But when asked to give McCarthy's exact words the witness testified (XQ38):

> "A. I can't give the exact words. Mr. McCarthy asked me if I sold much Coco-Quinine and I replied that I sold a good deal. Mr. McCarthy then asked me if I wouldn't buy a preparation of chocolate quinine at a price considerably lower than that of Coco-Quinine, which contained the same amount of quinine in the same form and would answer every purpose of Coco-Quinine. Mr. McCarthy then made me a price on five gallons of this preparation which I think was about $3.25 a gallon. He also made me a price in single gallon quantity of $3.50 per gallon delivered. I gave Mr. McCarthy my order for one gallon.
>
> "XQ39. Have you now stated the entire conversation between you that day on Quin-Coco?
>
> "A. To the best of my recollection I have.
>
> "XQ40. And you can't think of anything else he said.
>
> "A. I cannot."

McCarthy (III, p. 1372, Q49) testified that when he made that call on Reid, he had "never mentioned Coco-Quinine at all."

(7) Moseley, a retail druggist of Geneva, Alabama, testified that McCarty told him his preparation was a similar and just as good a preparation as Coco-Quinine; that other people were using it; that there was a saving in the price; that it was used on physicians' prescriptions and dispensed on calls. He admitted that he did not buy any Quin-Coco.

The cross examination very clearly brought out the fact that the witness did not consider that Mr. McCarthy had suggested that he use Quin-Coco in place of Coco-Quinine without the consent of the doctor on a prescrip-

tion or of the customer over the counter (Rec., Vol. I, pp. 278-279).

He testified:

> "A. A conversation having taken place as long ago as that would be right hard to repeat verbatim.
>
> "XQ37. Repeat it as nearly as you can?
>
> "A. Well, Mr. McCarthy solicited me to buy Quin-Coco or their preparation of chocolate quinine; I don't know as he used the word 'Quin-Coco.' He told me that there was a saving in price and that other druggists were buying it.
>
> "XQ38. What else did he say?
>
> "A. In regard to Quin-Coco. He said it was as good a preparation as Coco-Quinine. I don't remember all that was said. We talked about business in general. I couldn't tell everything that Mr. Carthy said to me or that I said to him.
>
> "XQ39. I have been asking you to search your memory and state the entire conversation on the subject of Quin-Coco. Is there anything else that you can remember on that subject?
>
> "A. I think that I have given during my examination practically all that is connected with the subject.
>
> "XQ40. I read you Q19 and your answer. I take it that you hardly mean that there is no way to sell Quin-Coco except to fill prescriptions and calls for Coco-Quinine, dishonestly.
>
> "A. No, I don't say that.
>
> "XQ41. And you don't mean to say, do you, that Mr. McCarthy suggested to you that you should dispense Quin-Coco dishonestly and sell it to customers dishonestly?
>
> "A. He didn't suggest to me to do anything he called dishonest."

Reid's testimony was read to McCarthy, the salesman, and he was asked if what Reid said was true. He replied (Vol. III, p. 1372):

> "A. to Q54. At the time I called on Mr. Reid and showed him this Quin-Coco I never mentioned

> Coco-Quinine at all. He was familiar with the Quin-Coco preparation before and I never made any suggestions whatever as to how he was to dispense of it or sell it."

And on cross examination McCarthy testified:

> "XQ197. Can you recall what you did say to Mr. Reid?
>
> "A. The usual sales talk of the Quin-Coco, the consistency of the preparation; that is, the quality and the quantity of quinine it contained, and it could be handled easily and dispensed in small-necked bottles.
>
> "XQ198. That is all?
>
> "A. That is all."

(8) JOLLY, a retail druggist of Marshallville, Georgia, testified that Nottingham, one of petitioner's salesmen, represented

> "that this product, this Quin-Coco, is the same as Coco-Quinine, and it comes much cheaper. I think that is about all there was to it. There may have been some few other words like that."

Plaintiff's counsel then asked (Vol. I, p. 293):

> "Q20. Did he say anything about whether or not you could use it to supply the demand for Coco-Quinine?
>
> "By Mr. Rawle: Objected to as leading because the only proper question is as to what was said.
>
> "A. He did.
>
> "Q21. What did he say as near as you can remember? A. All he said was that it is the same as Coco-Quinine and you can supply your trade accordingly."

He bought one gallon on these representations, and had given it to customers calling for chocolate quinine, quinine syrup, etc. (Rec., Vol. I, pp. 286-287).

NOTTINGHAM, the salesman (Vol. III, p. 1454, Qs 30 to 39), having had Jolly's testimony read to him, denied Jolly's statements positively. He said there were a dozen Chocolate Quinine preparations on the market (XQ69). I never suggested, as he says, to use Quin-Coco in the place of Coco-Quinine (XQs 78, 79). I never represented to Mr. Jolly or to anyone else that Quin-Coco could be used to supply the demand for Coco-Quinine; or could be subsituted for Coco-Quinine.

(9) E. B. ALLEN, a pharmacist of Norfolk, Virginia, testified that Moon, one of defendant's salesmen, on several occasions had offered him a preparation which he called Quin-Coco, which he stated he could use the same as Coco-Quinine, and that it would be almost impossible to tell it from Coco-Quinine. He could not remember his exact words. On cross examination, the witness stated that about a year previously Moon had called his attention to Quin-Coco, "elaborating upon its pharmaceutical qualities and stating the same was a product practically identical with Lilly's Coco-Quinine, and that the same could not be distinguished from it. On the visit during May of this year (1915), in talking of chocolate quinine syrups, he again stated that he had as good a piece of goods as Lilly's, and one that could be used for all purposes that 'Coco-Quinine,' could be used." The witness further stated that he did not believe that Mr. Moon meant to suggest a dishonest substitution of Quin-Coco for Coco-Quinine (Rec., Vol. I, pp. 343-344-345). There was no evidence that he bought or dispensed any.

MOON, the salesman, denied Allen's statements (Vol. III, p. 1466, Qs 29 to 43):

> "Q43. He testified that he had not made any suggestion to Allen that he could use Quin-Coco for Coco-Quinine without detection" or (XQ51) "that Quin-Coco could be used in place of Coco-Quinine."
>
> "Q11. He also testified that there were 12 or 14 other makes of Chocolate Quinine on the market."

(c) ***Five druggists testified that improper representations were made to them by Petitioner's salesmen but admitted no "passing off" actually was practiced by them. Four of these witnesses made no purchases after these alleged representations. On cross examination they entirely modified their statements.***

Such testimony as to improper representations in each case was positively contradicted by the salesmen charged to have made such representations.

(1) MERITHEW, a druggist of Highland Park, Michigan, testified that Starring, one of petitioner's salesmen,

> "offered to sell me a preparation known as Quin-Coco, stating that it could be dispensed as Coco-Quinine, when Coco-Quinine was called for. He exhibited a sample from his sample case, and stated to me that in both taste, physiological action and appearance it could not be distinguished from the original Coco-Quinine."

On cross examination, he stated the conversation thus:

> "XQ29. Wasn't what he said that Quin-Coco was a similar preparation to Coco-Quinine and lower in price?
>
> "A. I cannot state his exact words, but he inferred to me that Quin-Coco was lower in price than Coco-Quinine, and therefore several of the druggists were dispensing it in the cities of Michigan which I heretofore named.
>
> "XQ30. And that is the substance of what he said to you?
>
> "A. No, it is not. He spoke about the similarity of the preparation both in quality of quinine contained in each ounce, the physiological action and appearance. Now I am through.
>
> "XQ31. Have you finished your answer to that question?
>
> "A. I have."

He said that he did not accept this proposition, nor purchase Quin-Coco (Rec., Vol. I, pp. 60-61).

STARRING, under oath, emphatically denied this testimony (Rec., Vol. III, p. 1431). He further testified that Merithew had never bought any Quin-Coco from him; that he had called upon him four or five times for the purpose of collecting a past due account from him amounting to about $15, which he finally did collect, but that on none of these visits did he attempt to sell him any drugs (Rec., Vol. III, p. 1432).

(2) SCOTT, a druggist of Memphis, Tennessee, testified that DuVall, representing petitioner, called on him and stated that Quin-Coco could be dispensed and sold as Coco-Quinine, Lilly's; that on another occasion Du Vall called on him and stated that he could put up and dispense Quin-Coco on specified prescriptions for Lilly's Coco-Quinine; that it was the same thing as Coco-Quinine, Lilly's, and was much cheaper (Rec., Vol. I, p. 114).

On cross examination he was asked:

> "XQ26. You have testified that it is dishonest and unethical for a druggist when receiving a prescription which specifies Coco-Quinine, to fill it without the consent of the physician by using Quin-Coco. It appears to me from your answer that Mr. DuVall, if your memory is correct, was proposing to you, as a druggist, that you should do or commit this dishonest and unethical act. Is that not so? A. If I may be allowed to express this, I don't think Mr. DuVall intended that reflection upon me, as according to Mr. DuVall's statement so many were using and substituting this so called Quin-Coco, and my opinion was that Mr. DuVall wanted to let me in on a close substitute. That is the way I felt about Mr. DuVall's suggestion to me in regard to Quin-Coco. I feel sure that Mr. DuVall never had any reason to reflect upon me, and would not have done so.

"XQ27. But have you not testified that he suggested to you that you should use Quin-Coco in prescriptions calling for Coco-Quinine? A. He did not suggest that I should use them. He said it could be done, and was being done.

"XQ28. Didn't he mean that you could do it? A. I didn't take it that way. I took it that it could be done if I was disposed to do so, that is the impression the interview had on me.

"XQ34. But wasn't he suggesting to you that you do a dishonest thing?

"A. *He was not,* and I did not feel that he was.

• • • • • • •

"It didn't impress me as being an immoral suggestion, and I feel sure that Mr. DuVall would not have any cause to offend me in any way. I considered his suggestion in regards to Quin-Coco being substituted for Lilly's Coco-Quinine as a matter of gossip and more so than suggestion, no reflection upon my being ethical or my honesty as a pharmacist or man.

"XQ37. How could an honest druggist, as you are, handle and dispense both Coco-Quinine and Quin-Coco?

"A. My explanation is that I never, when I was in the retail drug business for myself, handled but one preparation of Coco-Quinine, that being Lilly's. When I was employed by other houses that had this Quin-Coco in stock I used same upon consent of physicians only. I have called the attention of several physicians to this Quin-Coco asking them to prescribe same to enable me to dispose of it so I could buy the original Lilly's Coco-Quinine to use on their prescriptions."

The witness further stated that he did not buy any Quin-Coco from Mr. DuVall (Rec., Vol. I, pp. 114, 117-118).

DeVall testified that he never had solicited Scott's trade when he was in the drug business for himself, and categorically denied the statements attributed to him by

Scott as above set forth. He had never had any conversation with Scott on the subject of the sale of Quin-Coco (Rec., Vol. III, pp. 1387-1389). Evidently, Scott was mistaken in his recollection as to the person with whom he had talked on this subject.

(3) BARNES, a retail druggist of McComb City, Mississippi, testified that Quin-Coco had been offered to him by Gonzales, one of petitioner's salesmen,

> "to be used as a substitute for Coco-Quinine and said that it was the only preparation of chocolate quinine on the market that could be dispensed for Coco-Quinine without any one being the wiser."

On cross examination he repeated this statement and added: "Besides, it is cheaper" (Rec., Vol. I, pp. 180, 181, 183). He did not buy any (I, 180).

GONZALES categorically denied these statements (Rec., Vol. III, pp. 1361-1363).

On cross-examination, he testified:

> "XQ110. You deny in toto everything that Mr. Barnes testified to on this subject? A. Absolutely so, yes, sir.
>
> "XQ111. You charge Mr. Barnes with lying in this testimony that he has given? A. Yes, sir.
>
> "XQ112. What object do you suppose Mr. Barnes might have had in so doing? A. I don't know of any object that he had. I couldn't possibly tell. There was never any conversation of that kind between him and I, positively not * * *" (Rec., Vol. III, p. 1366).

(4) W. S. AMES, a retail druggist of Laurel, Mississippi, testified:

> "Quin-Coco has been offered to me for sale as a similar preparation to Coco-Quinine, and I have been told that I could dispense it on calls for Coco-Quinine, without detection, and that it was the same goods exactly. That's about the only representations I have had. * * * It was quoted at a cheaper price to me than Coco-Quinine."

He could not remember who made this representation to him. A Mr. Jones, representing petitioner, had called upon him, but he did not remember whether he was the person who offered him Quin-Coco or not. He could not remember verbatim the words used (XQ45) (Rec., Vol. I, pp. 218-221). *He did not testify that he bought any Quin-Coco.* He did not keep it, and had no knowledge about it from actual experience in handling it (Rec., Vol. I, p. 219).

When asked for the salesman's exact words, he testified (p. 221):

> "XQ43. Please state the exact words which Mr. Jones used in offering you Quin-Coco, as far as you can remember them?
>
> "A. To begin with, I won't state that Mr. Jones was the salesman that offered me Quin-Coco positively. But Quin-Coco has been represented to me as being identical with Coco-Quinine and offered to me at a cheaper price.
>
> "XQ44. Did that salesman offer it to you at that time as being identical with Coco-Quinine and cheaper?
>
> "A. Yes, sir.
>
> "XQ45. What else did he say?
>
> "A. Not anything of any importance other than that it was just chocolate quinine, chocolate syrup of quinine in it and that it was identical with Coco-Quinine. He probably said something else but I don't exactly remember verbatim.
>
> "XQ46. Please try to remember what else he said, if anything, and give the exact words in which he said it?
>
> "A. It is hard to answer that question, because he didn't say anything more than any other salesman would say when he is offering a similar preparation to one that is already on the market."

Jones testified that he had never made to Mr. Ames such statements as those quoted, nor to anyone else (Rec., Vol. III, pp. 1328-1329).

(5) McMillan, a retail druggist at Pritchard, Alabama, testified that he heard of Quin-Coco through McCarthy, one of petitioner's salesmen, who asked him

> "if I didn't want some of their preparation Quin-Coco. I told him 'No, we couldn't substitute.' He told me it was all right, that it was the same thing as Coco-Quinine, that you couldn't tell the difference. And that it was the original preparation, brought out by a doctor who didn't have the money to back it up with advertising. And that in the meantime Lilly had put Coco-Quinine on the market and that then Warner brought out this Quin-Coco and put it on the market. He told me it wouldn't be substituting at all, that you couldn't tell the difference between it and Coco-Quinine. That is about all."

He was then asked:

> "Q6. In what way did he tell you that it could be used or dispensed, that is, in response to what character or calls or demands?
>
> By Mr. Rawle: Objected to as leading and because the witness has already answered as to the conversation.
>
> A. As 'Coco-Quinine.'
> Q7. What kind of calls for Coco-Quinine?
>
> (Same objection.)
>
> A. Either prescriptions or calls over the counter.
> Q8. How are prescriptions written received at your store for 'Coco-Quinine'? A. 'Coco-Quinine,' just the name and the amount.
> Q9. Whose product do you understand is intended by the physicians when they write prescriptions just 'Coco-Quinine'? A. Lilly & Company's" (Rec., Vol. I, p. 244).

On cross examination he testified that McCarthy told him that Quin-Coco was a similar preparation to Coco-

Quinine, and cheaper in price, and could compete in the market with Coco-Quinine, and that that was about the substance of what he said to him. He said that he had had quite an argument with McCarthy as to the merits of Quin-Coco as compared with Coco-Quinine; that McCarthy said it was the same as Coco-Quinine, and could be dispensed without the doctor or patient detecting it, and that it cost less money (Id., p. 246).

McCarthy testified that the only true part of McMillan's testimony was that he, McCarthy, had asked McMillan if he wanted some of the Quin-Coco; that the rest of his answers were untrue; that it was a fact that an argument over the merits of Quin-Coco as compared with Coco-Quinine had taken place between them, and that

> "he wanted to know what kind of preparation we had. I told him I considered we had the best preparation on the market of its kind and we sold it on a straight guarantee, and if it did not come up to what he thought it should, why to return it and get credit for it."

He specifically denied that he had said that Quin-Coco was the same as Coco-Quinine, and could be dispensed without the doctor or patient detecting it (Rec., Vol. III, pp. 1370-1371). *It does not appear that McMillan bought any Quin-Coco or handled it.*

(d) ***Several discharged employees of Petitioner testified on Respondent's behalf to representations made by petitioner's salesmen to induce sales, which, in effect, were that Quin-Coco was the same as Coco-Quinine, could be used in its place and was cheaper; all of which was true.***

Groves, who for four years and three months had been employed by respondent, for five years and two months previously had been in petitioner's employ, first, in the

laboratory as general helper, and for the last two years of his employment as traveling salesman, produced and testified to a comparative sheet showing the goods manufactured by petitioner which could be sold against goods manufactured by other pharmaceutical houses, the purpose of it being to enable him to sell goods of petitioner's manufacture against goods manufactured by other houses at a much cheaper price. He further testified that he sold Quin-Coco as a substitute for Coco-Quinine,

> "as identical in appearance, containing the same amount of quinine; and said it could be sold on prescription as 'Coco-Quinine'";

that on calling on a druggist, if he found he was a user of Coco-Quinine, he used his best efforts to sell him Quin-Coco,

> "pointing out to him that the product was equally as good as Coco-Quinine and cost him less money and could be dispensed on prescriptions and sold over the counter as 'Coco-Quinine'";

that these statements and representations were made on the authority of the petitioner, pursuant to instructions given by either Mr. Hagaman or Mr. H. Pfeiffer. He could not recollect the words used by those gentlemen, or that either of them told him that Quin-Coco was an exact duplicate of Coco-Quinine (Rec., Vol. I, pp. 358-359).

Groves referred to a date nine years and five months previously to testifying. Could he remember what was said to him that long before? Is not his statement quite too stale to depend upon?

On re-direct examination, he was asked whether or not Mr. Hagaman told him what statements he made to druggists to induce them to buy Quin-Coco, to which he answered:

> "Yes, he told me that by pushing 'Quin-Coco' we were pushing as good an article as 'Coco-

Quinine,' Lilly, the therapeutic action being the same and containing the same amount of quinine, and on subsequent trips with me after he was made assistant sales manager we pushed 'Quin-Coco' along with other things.

"We sold 'Quin-Coco' as a substitute for 'Coco-Quinine,' telling the druggists that it was a similar product to 'Coco-Quinine' in appearance and taste, containing the same amount of quinine as 'Coco-Quinine,' and much cheaper in price, one gallon costing $3.75 and 'Coco-Quinine' would cost them in five pints $3.30."

That he stated to druggists in Bristol that they could use Quin-Coco for Coco-Quinine; that Mr. H. Pfeiffer gave him comparative lists, samples, catalogue, etc., before he began working as salesman for petitioner (Rec., Vol. I, pp. 366-367).

This means nothing more than selling Quin-Coco in competition with Coco-Quinine to take the place of Coco-Quinine.

But his re-cross examination rendered him innocuous (p. 368):

"RXQ93. Will you swear that you ever heard Hagaman say to a druggist that he could buy 'Quin-Coco' and substitute it on calls for 'Coco-Quinine'? A. I have heard him tell druggists that 'Quin-Coco' could be sold as 'Coco-Quinine,' but where I cannot say.

"RXQ94. Can you swear that you ever heard Hagaman advise a druggist to buy 'Quin-Coco' and substitute it on calls for 'Coco-Quinine'? A. Yes.

"RXQ95. What did he say to them? A. That 'Quin-Coco' *was a similar product to 'Coco-Quinine'* containing the same amount of quinine and was like it in appearance. * * * *That was our only method of selling it.*

"RXQ97. And that is what Hagaman said? A. He could say nothing else.

"RXQ98. And that is what you used to say? A. Yes, it being the only selling point we had" (Rec., Vol. I, p. 368).

While Groves formerly was employed by petitioner, he later entered the employment of respondent as a traveling salesman. In this testimony, the statement of instructions from Mr. H. Pfeiffer or Mr. Hagaman to the witness is so weak as hardly to require denial, but Mr. HENRY PFEIFFER denied specifically that he ever gave Robert J. Groves instructions or authority to make the statements to druggists to which he testified (Rec., Vol. III, p. 1238).

Mr. HAGAMAN also testified he had never authorized a traveling salesman to suggest to retail druggists that they could sell Quin-Coco on prescriptions or over the counter, when Coco-Quinine was called for (p. 1278).

GROVES, being recalled in rebuttal, testified further concerning instructions given by Mr. H. Pfeiffer and Mr. Hagaman as follows:

a. Statement of or instructions by Mr. H. Pfeiffer: Witness denied that he was told by Mr. Pfeiffer that it was a reprehensible act and dishonest to advise druggists that they could substitute preparations for preparations of other houses; that it was unethical and a violation of confidence (Rec., Vol. II, p. 777).

The witness' attention was called to the alleged instructions of H. Pfeiffer on this subject, when it is clear that counsel intended G. A. Pfeiffer's instructions (Rec., Vol. III, p. 1205).

b. Statements of or instructions by Hagaman: The witness was asked what he had to say as to the statement of Hagaman that it was dishonest to suggest to a retail druggist that one product can be sold when the product of another house is called for.

> The witness stated that Mr. Hagaman was selling goods every day in the week as a substitute or replacer for highly advertised goods of other houses (Rec., Vol. II, p. 778).

It is perfectly evident that this testimony of Groves is no denial in rebuttal, for Hagaman was referring to substitution of one article for another, when there is a specific call for the latter, while the witness Groves was referring to the sale of preparations sold by all manufacturers in common.

What Groves meant by "selling Quin-Coco as a substitute" appears from his own evidence (Vol. I, p. 359):

> "Q16. What did either of them (Hagaman or H. Pfeiffer) say to you, if anything, as near as you can recall, in regard to Quin-Coco? A. That Quin-Coco was an exact duplicate of Coco-Quinine."

That was all and that was true.

These statements as to H. Pfeiffer's instructions must be rejected, as on cross examination Groves testified (Vol. I, p. 365):

> "XQ77. Do you swear that out of these ten or thirty thousand items you were to sell Mr. Henry Pfeiffer *picked out 'Quin-Coco'* which the company had just begun to sell and gave you special instructions as to how to sell 'Quin-Coco'? [Italics ours.]
>
> "A. I do not."

Hagaman, the petitioner's sales manager, referred to by Groves, categorically denied Groves' statement when read to him from the Record (III, p. 1488, Q24). He further testified that his instructions to Groves were thus (Q19):

> "A. I instructed Mr. Groves always to be honest and fair and not to mention the names of our competitors, as our line was very large and it would keep one salesman busy selling our goods."

Again it may be asked, as Groves had been petitioner's salesman for two years, and if he really did practice "unfair" methods, where are the druggist on whom he practiced these methods. Not one of them has been produced. And yet, Groves' territory, when he was a Warner salesman, was Southeastern Pennsylvania (Rec., Vol. I, p. 366, RDX78), and when he became respondent's salesman he worked the same territory (Vol. I, p. 358, Q1)—the very territory in which this suit was instituted.

Only one witness, a discharged employee of petitioner, testified explicitly that an officer of petitioner instructed salesmen to represent that Quin-Coco could be substituted for Coco-Quinine without the knowledge of either prescribing physician or patient. This testimony was specifically denied by two witnesses.

This witness was one THURMAN, who, from 1903 to 1908, was a salesman for the Pfeiffer Chemical Co., and from 1908 to 1912 for the petitioner, from whose employ he was discharged for cause two and a half years before he testified. He had an obvious bias. As to his discharge, see Merner (Vol. III, p. 1290, Q93) and Thurman (Vol. II, p. 812). He travelled twice from Omaha to Indianapolis to testify against his former employer (Vol. I, p. 391).

Being asked to explain the methods and arguments he employed in soliciting orders for Quin-Coco, and from what source he obtained authority for the same, he answered:

> "Quin-Coco was sold under the Searle & Hereth label. The preparation of Quin-Coco was put on the market by the Pfeiffer Chemical Co. previous to their buying the Searle & Hereth Co., but was not pushed to any extent until after the purchase of the Searle & Hereth Co. We were instructed principally by Mr. Garwin who had charge of the pharmaceutical laboratory for the Pfeiffer Chemical Co. at that time. We were instructed by

> Mr. Garwin to recommend to the trade that the preparation of Quin-Coco was exactly the same as the preparation of Coco-Quinine put out by Eli Lilly & Co.; to tell the trade that Quin-Coco was identical with Coco-Quinine and our argument to get business on this preparation was to explain to the trade that our preparation of Quin-Coco was much cheaper and would answer every purpose of Coco-Quinine and to explain to them how much money could be saved by buying Quin-Coco instead of Coco-Quinine. We were also instructed by office managers, circular letters to salesmen,* etc., to push this Quin-Coco as a substitute for Coco-Quinine, the same as per instructions from Mr. Garwin.† This Quin-Coco was one of the best selling specialties of the company." (Rec., Vol. I, p. 392.)

These instructions, he stated, he got from Mr. Merner, manager of the St. Louis Company, and Mr. H. Pfeiffer, president of the Pfeiffer Chemical Company, who had traveled with him on the road at numerous times. He said that Mr. Pfeiffer knew very little about pharmaceuticals, and left the selling of them to the witness when he was with him, his instructions being always given to him privately. Being asked:

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*He did not produce or identify any such letters.

†"Pushing as a substitute" can mean nothing more than correct competitive selling. Thurman explains his meaning of "substitute" (Vol. I, p. 398):

> "XQ50. You have just used the word 'substitute.' Do you use that in the same sense in which you have just been using the word 'replacer'?
>
> "A. Yes, sir.
>
> "XQ51. And I take it that you mean by both of those words an article which you were selling which was in competition with a similar article of another house? Is that correct?
>
> "A. No, not exactly.
>
> "XQ52. Then in what sense have you used those two words?
>
> "A. As a substitute and replacer for original preparations made by the different companies.
>
> "XQ53. Don't you mean by 'substitute' and 'replacer,' articles which you were offering and which were in competition with similar articles of other houses?
>
> "A. Yes, I guess that's right."

That is, both words as he understands them, mean plain trade competition.

> "Q12. Did your representations to the retail druggists include instructions to them as to how they could dispense it and if so, what did you tell them on that point?"

he answered (over objection by petitioner's counsel):

> "We were instructed by the company to tell the trade that this preparation of Quin-Coco could be used and dispensed on calls for Coco-Quinine; and, that it could also be used on prescriptions for Coco-Quinine *without the knowledge of the physician or the patient,* as the preparation of Quin-Coco was exactly the same as Coco-Quinine." (Rec., Vol. I, p. 393, italics ours).

This statement, which differs entirely from his lengthy reply to Q7, just quoted, was his only bit of evidence directly connecting the petitioner corporation with unfair selling methods.

HENRY PFEIFFER, above referred to, positively denied the truth of this last quoted testimony (Rec., Vol. III, p. 1239). Merner also denied it, and stated that Garwin never had had any authority from him as manager of the business, or from the Company, to give instructions to salesmen as to the sales policy of the house, and that none of the circular letters referred to by Thurman in his testimony contained any instructions of any kind to his salesmen as to pushing the sale of Quin-Coco as a substitute for Coco-Quinine; that he did not instruct Thurman to sell Quin-Coco as a substitute for Coco-Quinine; that to the best of his belief he had not talked to him on that subject; that he never gave him instructions to tell the trade that Quin-Coco could be used and dispensed on calls for Coco-Quinine, and that it could also be used on prescriptions for Coco-Quinine without the knowledge of the physician or the patient, as the preparation of Quin-Coco was exactly the same as Coco-Quinine; and that he is emphatic in stating that if, as it was possible,

he did discuss Quin-Coco with Mr. Thurman, he never instructed him that Quin-Coco could be used on doctor's prescriptions where Coco-Quinine was specified, and that he did not instruct him that "these preparations" were exact substitutes for the original preparations made by the other companies (Rec., Vol. III, pp. 1387-1389).

Thurman, himself, on cross examination, admitted that the methods of sale which he employed were dishonest, but he claimed that he was compelled to follow the instructions of his employers. He was then asked:

> "XQ79. Then from 1903 to 1912 you systematically played the part of a dishonest salesman, did you? A. I do not know whether you would term it that way or not.
>
> "XQ80. How do you term it, in view of just what has been said? A. It is simply following the instructions of the house. If the salesman was dishonest, the house was certainly more dishonest in instructing the salesman to do this.
>
> "XQ81. When did Garwin give you instructions? Was it when you started in 1903? A. Well, it was a little later that they began putting out this list, probably 1905.
>
> "XQ82. And was that the time Merner talked with you? A. Yes, and later than that.
>
> "XQ83. How much later? A. Well, up to the time I left the employ of the company, December, 1912.
>
> "XQ84. What did he say to you? A. Well, his instructions to us were about the same as Mr. Garwin's: that these preparations were exact substitutes for the original preparations named by the other companies. He also instructed us that Quin-Coco could be used on Doctor's prescriptions where Coco-Quinine was specified and for us to show the druggist how much he could save by buying this substitute and replacer preparation from our company and that there was no use of a druggist paying the price for these original preparations when he could buy something that would answer all purposes and save him quite a little money" (Rec., Vol. I, p. 402).

Now, Thurman sold Quin-Coco for over four years. He testified that his selling methods were "unfair," but not a single druggist on whom he practiced his "unfair" methods has been produced—not one, with all the detective force of the respondent's 140 salesmen working up for five years the proofs in this case.

HENRY PFEIFFER positively denied that he gave the instructions testified to (Rec., Vol. III, pp. 1239, 1240), as did also Mr. Merner (Rec., Vol. III, p. 1289). On cross examination, Thurman admitted that he had been discharged from petitioner's employ by a letter written December 13, 1912, by Mr. Merner (Rec., Vol. I, p. 403).

Mr. G. A. PFEIFFER declared that he had never directly or indirectly authorized or suggested to any one of his salesmen that he should or might suggest to any retail druggist that he could dispense Quin-Coco on prescription or on calls over the counter when Coco-Quinine was specifically called for (Rec., Vol. III, p. 1213).

THURMAN sold Quin-Coco for six years. He says his selling methods were "unfair" and that he was so instructed by petitioner. The instructions are categorically denied. No druggist to whom he sold by "unfair" methods was called to corroborate him.

Thurman was called again in rebuttal.

> His attention was directed to the testimony of Mr. Henry Pfeiffer, who stated that if any salesman had suggested to druggists that they should buy Quin-Coco and supply it on prescription or sales when Coco-Quinine was called for, it would be contrary to his orders and his teachings and in violation of the selling rules of the house. (Rec., Vol. II, p. 806.)
>
> He was asked to state occurrences when traveling with Mr. Pfeiffer inconsistent with this statement. Mr. Thurman then stated that Mr. Pfeiffer had recommended to Snyder of Bennett Co. in Omaha that the perfume Vogue was exactly

like Jickey and could not be told from the Jickey odor and that Snyder bought a gallon of Vogue (Rec., Vol. II, p. 807).

The difficulty about this evidence is that Thurman admitted that the transaction "could have taken place a year before the petitioner was chartered" (Vol. II, p. 813, XQs26-28). The incident was also stale—about nine years old.

Thurman's testimony given on his direct examination admitted the dishonesty of his methods of selling. His testimony is unworthy of credence where contradicted by any other witness.

PERRINE, who had been employed by petitioner approximately 2½ years as a salesman, told of instructions given him by petitioner's special representative, Nowlin, who gave him a list of products manufactured by petitioner which would replace special preparations manufactured by other companies, and particularly stated that Quin-Coco would replace the product known as Coco-Quinine. Letters produced showed that this witness had a grievance against the petitioner for its apparent intention to change his territory (Rec., Vol. II, pp. 658-663).

GREEN, a retail druggist at Atlanta, who had been traveling salesman for petitioner from 1913 to 1915, testified to instructions given him on behalf of petitioner by Mr. McNulty, who gave him a "replacer list" which was used as showing items similar in character to items of other houses "but sold to the retailer under the individual firm's own title or name," on which list was "Quin-Coco, Part 3 S. & H.," which also gave a comparative price, the Lilly price and the price of Quin-Coco. He said that the inference from Mr. McNulty's statements to him, "if not his direct suggestion," was that certain items be sold as replacers for certain other items; that he drew this inference from

"his showing of the items; sometimes comparing its general appearance, and the formula in many instances, as compared with other formula; as being the same in medicinal consistency and therapeutic value, and more profitable to the retailer or dispenser.

Q16. You mean that this was Mr. McNulty's practice in selling the Warner line in your presence? A. Yes, in many instances" (Rec., Vol. II, pp. 798-800).

On cross examination, this witness admitted that his services had been dispensed with by Warner & Company, who had trouble in collecting an account due by him (Rec., Vol. II, pp. 802-805).

McNULTY testified for petitioner that his instructions to salesmen were

"to sell our preparations on the merits of the various preparations, not to mention a competitor at all, to be strictly honest and adhere to the truth at all times."

That he never had, acting for his house, authorized or suggested to any retail druggist to dispense Quin-Coco, S. & H., when Coco-Quinine, Lilly, was called for by prescription or over the counter, and that he had no personal knowledge of a retail druggist doing that, except so far as he had heard it in this case (Rec., Vol. III, pp. 1252-1253). That he never had instructed any salesman specifically in reference to pushing Quin-Coco, although he had himself personally sold it (Rec., Vol. III, p. 1257). He further testified that he had never suggested that a product of his house should be used as a substitute for another specified preparation (Rec., Vol. III, p. 1570).

(e) ***Two druggists, witnesses for Respondent, admitted their own practice of dishonest substitution, but did not testify to any representations made by salesmen of Petitioner to induce those acts.***

(1) Bowden, a druggist of Jennings, Louisiana, testified that he had purchased Quin-Coco from Mr. Jones, one of petitioner's salesmen; that he supplied Quin-Coco usually on a call for Coco-Quinine, simply because he got a better price on it, and dispensed it to save a little money; that that was not the act of an honest druggist; that in such cases he gave the customer to understand by implication that he was getting Coco-Quinine, "in fact it was labelled 'Coco-Quinine'" (Rec., Vol. I, pp. 138-139).

(2) Turner, a retail druggist of Mt. Vernon, Texas, testified that he had used Quin-Coco on a physician's prescription which called for Coco-Quinine, Lilly; that he also dispensed Quin-Coco over the counter when Coco-Quinine was called for, labelling the bottles "Coco-Quinine." There was no suggestion that this was done at the instance of petitioner or one of its representatives (Rec., Vol. I, pp. 384-386).

In addition to these two, one Bell, a traveling salesman employed by respondent, testified that in one particular instance, he saw the clerk in a certain drug store bottling Quin-Coco and labelling it Coco-Quinine; that he was pouring it out of a Quin-Coco bottle into bottles for retail, and labelling those bottles "Coco-Quinine." Witness was allowed, over petitioner's objection, to testify that he had purchased on one occasion a package labelled "Coco-Quinine," which, on presentation to the druggist, "he reluctantly admitted" was Quin-Coco.

> "This druggist also admitted that such labeling was customary with him" (Rec., Vol. I, pp. 312-313).

The druggist was not produced, nor was there any suggestion that he had been induced to this dishonest practice by petitioner or one of its representatives. The testimony clearly was hearsay, was objected to, and should have been excluded.

The foregoing evidence, even if uncontradicted, would be insufficient to sustain the findings of the Circuit Court of Appeals; but as a matter of fact it was flatly contradicted, not only by the salesmen of petitioner charged by the witnesses named with making the representations inviting to fraudulent action, but by other testimony of officers and employees of petitioner.

(f) ***Five other former employees of petitioner, two of them in respondent's employ, were called to support respondent's contention. Their testimony failed to show any complicity on petitioner's part in suggesting the "passing off" of its goods for those of respondent.***

1. KELTON, one of respondent's witnesses, had been a salesman with the Pfeiffer Chemical Co. for five and a half years; then four and a half years with the petitioner. He had been discharged for a gross cause over two years before he took the witness stand. (MCNULTY, Vol. III, p. 1254, Qs 23 to 35). Kelton was afterwards on the witness stand, but he did not deny what McNulty said about the cause of his discharge.

Kelton testified (Vol. I, p. 95):

> "Q7. What were your usual representations to the trade when soliciting orders for Quin-Coco? * * * "A. I always demonstrated Quin-Coco as a preparation similar to Coco-Quinine, showing to them that the Pfeiffer Chemical Company (or the Searle Hereth Company) product was even a better preparation to my mind than the Coco-Quinine which the trade had formerly sold. I demonstrated this by showing that Quin-Coco would not coagulate in the bottom of the container as easily as the Coco-Quinine.

"I also showed the difference in price, invariably quoting our gallon price against the Eli Lilly & Co. five pound price. In big buyers I tried to induce them to take advantage of our five gallon deal, thus reducing the price to five cents lower per gallon than the Coco-Quinine is in five pound lots. This, of course, was only to dealers who could handle that quantity and always to retail druggists only.

"I made a specialty of Quin-Coco from the fact that I found it to be the very best 'repeater' we had in the pharmaceutical line. When a customer began buying this product in five pound lots he invariably bought it later in larger quantities, almost invariably" (Rec., Vol. I, p. 95).

"By the term 'repeater' in the sense used concerning Quin-Coco," witness stated, "I have reference to the fact that it would be reordered time and again. I also used the word 'replacer' which is a phrase used by pharmaceutical houses and salesmen when placing an article on the market at a cheaper price than the one which is called the 'original.' Quin-Coco therefore was a 'replacer' in the salesman's mind (I speak of my own experience) for Eli Lilly & Company's former manufactured product known to the trade the country over as Coco-Quinine." (Rec., Vol. I, p. 96).

Witness also stated that he considered, when he began the sale of Quin-Coco to the trade, and did now consider Quin-Coco as a superior preparation to Coco-Quinine (Rec., Vol. I, p. 96).

Witness further stated:

"I invariably sold Quin-Coco with the idea that it was to give the retail druggists, whose profits are few and far between anyway, a larger profit, demonstrating as above stated that if Coco-Quinine was called for to *influence the customer* to take the *Quin-Coco* instead. If the consumer gets a better product in my mind and the druggists

make a better profit, both are thereby benefited. * * * I would most positively state that in my long experience in selling Quin-Coco that it was resold as it was bought—to replace Coco-Quinine, and that in almost every instance, at my suggestion and demonstration, it was bought for the purpose of replacing Coco-Quinine. Therefore, it was almost in toto, according to various letters and personal talks with druggists, sold as a substitute for Coco-Quinine" (Rec., Vol. I, p. 97).

On cross examination, witness testified to his meaning of the words "repeater" and "replacer," and stated that the element of a lower price was an essential element of the term and one talking point he always used to induce the trade to buy the replacer instead of the original; that in making sales of Quin-Coco to retail druggists, his effort invariably was to induce them to influence their customers to use Quin-Coco, Searle & Hereth, in place of Coco-Quinine, Lilly. He said:

"I have previously stated that I believed then and believe now that Quin-Coco was and is a superior preparation to the Coco-Quinine manufactured by Eli Lilly & Co. The price also, as above stated, was the chief club I used with which to hammer against Coco-Quinine."

He was then asked:

"XQ35. I hope you will excuse me for asking you this question. I will ask you whether it was your practice to suggest to retail druggists that when they received a physician's prescription specifying Coco-Quinine, Lilly, they could without the physician's consent, or knowledge, fill that prescription with Quin-Coco, S. & H.? A. *Not for one instant did I suggest anything clandestine.* If the druggist could induce the physician to permit the said substitution I always suggested that this was right so to do. But there were so many instances where the customer came in and called for Coco-Quinine and the druggist could show him

> the large bottle S. & H., the color being the same, and he would usually say, 'Yes, that is what I want.'" (Rec., Vol. I, p. 100).

KELTON said he certainly did not suggest anything clandestine to a druggist in retailing over the counter Quin-Coco for Coco-Quinine. He always suggested to a druggist to show the customer what he was buying, telling him that this preparation would not coagulate.

> "At the same time the customer called for Coco-Quinine, but if he succeeded in showing him that he had a better preparation whether the customer knew it to be Coco-Quinine or not, that I do not consider clandestine. It is a matter of business, pure and simple and the poor retail druggist needs all the extra cash he can get. As stated several times I have always believed that when a man buys a better article than the one for which he calls he is none the loser. * * * If the druggist obtained the consent of the physician to substitute Quin-Coco when the physician had written Coco-Quinine that would be a matter entirely between the druggist and physician, for by mutual consent the Quin-Coco, as in this instance, could be substituted for Coco-Quinine. * * * *But at no time as above stated did I ever suggest to 'palm off' said Quin-Coco instead of the original product known to the trade as Coco-Quinine*" (Rec., Vol. I, pp. 100-102).

This testimony, it should be noted, was given by a witness called by respondent. Its failure to sustain respondent's contentions and the conclusions of the Circuit Court of Appeals is obvious.

Indeed, Kelton was, in effect, a most excellent witness for the petitioner, both as to the correctness of his selling methods and as to his ethical teaching by his former employers.

2. HOOPER (Rec., Vol. I, p. 15), a former employee of petitioner, testified as to alleged instructions from F. C.

Stevenson, representing the Pfeiffer Chemical Company, that he was

> "to sell Quin-Coco as a substitute product for Coco-Quinine, that being the only way that we could sell Quin-Coco as there was no demand at all for that article."

But on cross examination, after saying (XQ85, 94) that he "had so many things to learn as I (he) was just starting on the road and everything was new" to him, and that he "could not remember just what Stevenson said to him," he testified:

> "XQ96. The instructions given me by Mr. Stevenson were so emphatic that I am absolutely certain that Mr. Stevenson told me not only once but several times, that Quin-Coco was the same as Coco-Quinine."

Hooper, at the time of the taking of his deposition in the employment of the respondent, testified with a natural bias in favor of his present employer. He stated what his selling methods were without testifying that these selling methods were the direct result of the instructions given by Mr. Stevenson.

Hooper confessed that he "told the druggist that on a physician's prescription for Coco-Quinine he could use Quin-Coco, the products were so similar; that he need not be afraid of detection. In this manner we disposed of quite an amount of the Quin-Coco" (Rec., Vol. I, p. 15).

By this confession, Hooper stamps himself as dishonest and unscrupulous and he reaped the benefit of his fraudulent practices by increasing the magnitude of his sales.

STEVENSON denied that he instructed Hooper to sell Quin-Coco as a substitute for Coco-Quinine or that Quin-Coco could be sold as Coco-Quinine (Rec., Vol. III, p. 1411). He further denied that the "nut" of his instruc-

tions to Hooper was to sell Quin-Coco for Coco-Quinine (Rec., Vol. III, p. 1412). Stevenson stated that it would be dishonest, against the moral code of the drug business, and against his own personal moral code, if a retail druggist had a prescription or a call for the preparation of one maker and dispensed a similar preparation of another maker and that it would be dishonest for a drug salesman to suggest that he could dispense one article on prescriptions or calls over for the counter for a similar preparation of another maker. Hooper did not admit his conduct was dishonest in making such a suggestion, but he confessed that he perpetrated the fraud.

In weighing the evidence of these two witnesses, one an unscrupulous (discharged) salesman, *now in the employment of the respondent*, and the other a manager of the petitioner, who has not been impeached, the Circuit Court of Appeals was not justified in accepting as true the testimony of a man admittedly guilty of unfair practice and disregarding the denial of another whose character for credibility had not been assailed. The Court also failed to take into account the fact that the salesman was biased and prejudiced, that he was not disinterested and that his conduct was prompted by the desire to increase his sales and profits.

The witness was not corroborated; it is a case of oath against oath and under well settled rules of all courts and juries in determining the weight of evidence, the respondent did not sustain the burden of proof.

No druggist was called to show that Hooper had solicited his trade in Quin-Coco by "unfair" representations, although when he testified he had been for nearly three years a traveling salesman for respondent on the Western Coast, in which part of the country he had sold drugs for the petitioner for a year previously.

3. Groves (Rec., Vol. I, pp. 358-9), a former discharged employee of petitioner, testified as above set forth (*supra*, pp. 66-69).

4. HARDY (Rec., Vol. I, pp. 369-70) testified:

> He told the druggists when soliciting orders that they could use Quin-Coco as a substitute for Coco-Quinine, from the fact that it contained both quinine and cocoa and that he made such statements by authority of Mr. McNulty and Mr. H. Pfeiffer (p. 370); McNulty told him he could say to the druggists that they would have a right to sell Quin-Coco on doctor's prescriptions for Coco-Quinine as both contained quinine and cocoa *(ibid.)*.

Hardy was a former salesman of petitioner; when he testified he was employed by Atlas Oil Company.

MCNULTY positively denied that he ever authorized or suggested to any salesman that he should suggest to a retail druggist that he could supply an article of Warner's in place of one of another house, when the latter was called for by prescription or over the counter (Rec., Vol. III, p. 1252).

Mr. HENRY PFEIFFER specifically denied that he ever gave Hardy any such instructions or authority, his attention being called to the testimony of Hardy on the subject (Rec., Vol. III, p. 1238).

5. THURMAN (Rec., Vol. I, pp. 391-2), formerly a salesmen for petitioner, testified as above set forth (*supra*, p. 71).

POINT VII.

There was a market for Quin-Coco and petitioner offered its product for sale in that market.

The respondent argued very urgently that there was no market for Quin-Coco, and called various druggists to testify that they had never seen a prescription for it. From that erroneous assumption, it argued that Quin-Coco could not have been marketed except by "unfair" methods. But the evidence does not sustain the assumption. On the contrary, there were the dispensary physicians who bought it.

G. A. PFEIFFER testified that there were about 65,000 of them (Vol. III, p. 1209, Q128), and that one-sixth of the Warner drug sales are made to them (Q129).

The Circuit Court of Appeals draws a distinction between different classes of physicians by saying that the petitioner in placing its product on the market

> "did not send its salesmen to prescribing physicians presenting to them the merit of the preparation and soliciting their favor in prescribing its use as did the plaintiff, but sent its salesmen directly to druggists, to retail dealers * * * ."

All physicians prescribe remedies for their patients. Some physicians (mostly in the country) also dispense their own drugs. Probably no physician outside of large cities can be put absolutely in one category or the other. The testimony above referred to shows that petitioner's salesmen went to many physicians, principally dispensing physicians (65,000), because they were naturally the prospective buyers of any drug. It appears to us to be a strained argument to dwell upon the fact that petitioner's salesmen went to the obvious market for drugs to offer their wares, instead of devoting their efforts to

a campaign of education among physicians who did not buy or dispense their own drugs.

Various salesmen said they called on the dispensing physicians *(e. g.,* Brown, p. 1403).

Again, many of *respondent's* witnesses testified that there was a market for a chocolate quinine, a sweet syrup of quinine, or the like. Thus, Vol. I:

T. B. Dunham (p. 29, RDQ14): "Lots of people come into the store and call for preparations of that kind *under different names."*

E. H. Walsdorf (p. 207, XQ25): *"About fifty per cent., about one-half,* call for a 'chocolate quinine' preparation or similar words."

Sol Ray (p. 212, XQ36): "I would say about half the people call for chocolate quinine."

Fred R. Daly (p. 257, XQ18): "Sixty per cent. of the calls over the counter are for 'chocolate quinine.'"

John M. Moseley (p. 277, Q9): "About fifty per cent., I believe, call it 'chocolate quinine.'"

W. A. Cunningham (p. 283, Q13): "Nearly all of them [customers] ask for 'chocolate quinine.'"

Harry S. Arrington (p. 350, XQ17): "One-quarter to one-third of the calls are for 'chocolate quinine' or 'tasteless syrup of quinine.'"

Albert F. Knowles (p. 66, Q12): "The counter calls are for 'coco-quininé, chocolate quinine, and syrup of quinine brown color.'"

Max Samson (p. 188, XQ17): "A very considerable minority call for 'chocolate quinine' or similar words."

Will J. Bryant (p. 89, Q9): "We occasionally receive orders for chocolate quinine."

C. W. Jennings (p. 93, Q7): "Sometimes customers call for chocolate quinine."

V. B. Richard (p. 144, Q11): "They ask for a chocolate quinine and sometimes for coco-quinine."

R. L. Grigsby (p. 150, Q9): "I see it (quin-coco) in *dispensing physicians'* offices."

A. C. Fancher (p. 266, Q9): "I believe seventy-five per cent. of the druggists in my territory handle Quin-Coco."

W. A. Jolly (p. 287, Q25): "They called for 'Coco-Quinine,' 'chocolate quinine,' 'quinine syrup,' etc."

W. S. Ames (p. 219, XQ16): "They call for chocolate quinine quite frequently."

To the same effect were:

Nottingham, petitioner's salesman (Vol. III, p. 1451, Q70).

Wilson, petitioner's salesman (Vol. III, p. 1624, Q15).

G. A. Pfeiffer (Vol. III, p. 120, Q63).

Again, a druggist can always create a market by good business methods; by persuading his customers to buy*; by advertising or displaying the article; by urging prescribing physicians to prescribe it and dispensing physicians to buy it. Thus:

G. A. Pfeiffer (III, p. 1210, Qs 134 to 139).
H. Pfeiffer (III, p. 1237, Q29).
Richards (III, p. 1340, Q19).
Gonzales (III, p. 1358, Q23).
Moon (III, p. 1464, Q14).
Dr. Beringer (III, p. 1536, Q114).

*In *Walter Baker & Co.* v. *Gray,* 192 Fed., 921, it was held that a retail dealer can properly persuade a customer to buy one make of Baker's Chocolate in place of another.

POINT VIII.

The Circuit Court of Appeals erred in finding that the alleged unlawful practices of petitioner's salesmen were fully established by "an unusual number of witnesses," or that such practices were followed by salesmen with the sanction of their superiors so generally as to make petitioner chargeable with knowledge of them, or that the fraudulent substitution of Quin-Coco for Coco-Quinine was extensively practiced by druggists.

A careful analysis of the evidence completely refutes this conclusion, as the District Judge correctly held.

To sum up, a brief reference to the whole record shows that out of 137,760 physicians (Rec., Vol. III, p. 1209) and 53,773 druggists (Rec., p. 1211), and with 150 to 160 representatives of the respondent who scoured the country over a period of six years prior to December, 1917, when the case was closed (Rec., Vol. II, p. 876), and involving hundreds of thousands of calls upon druggists and physicians, the respondent was able to produce only *five* witnesses (out of one hundred and twenty-nine called in chief), who testified to definitely improper representations on the part of petitioner's salesmen made to induce sales of Quin-Coco. These witnesses weakened on cross examination and all of these representations were denied categorically by the petitioner's salesmen, and the druggists who testified to them, with one exception, did not act upon such representations by buying or selling Quin-Coco.

Classification of Respondent's Witnesses.

The witnesses who testified for respondent may be classified as follows:

Class A. Druggists to whom no representations were made, who testified to knowledge and sale of Coco-Quinine and knew of no other similar preparation.

Names of Witnesses	Rec., Vol. I Page	Names of Witnesses	Rec., Vol. I Page
Jesse E. Wilson.....	41	Frank Austin Fitch..	193
Rockwell Roman	53	Ralph G. Persell.....	194
Robert A. Hevenor...	72	Edward H. Walsdorf.	205
Cornelius P. Van Schaak	73	Floyd I. Ames.....	216
Harry W. Schuh.....	85	Samuel H. Colvin.....	235
Will J. Bryant.....	89	Quintus S. Adams....	243
Chesley W. Jennings.	92	Don J. Barber.....	260
Jerome B. Sand.....	103	Merrill P. Northington	264
Chas. L. Koellein....	104	Terry T. Greil.....	266
John R. Bond, Jr.....	122	Wm. A. Cunningham.	282
Carl Bordeaux	123	J. Johnston Moore...	284
Samuel V. Bracy.....	124	R. H. Greene.....	295
Walter L. Bolden.....	126	Joseph B. Riley.....	302
Alfred L. Soulier.....	127	E. G. Jacobs.....	302
Camille F. Gravel....	130	Wm. B. Franklin.....	304
Robt. L. Grigsby.....	149	Thos. C. Marshall....	305
John S. Foster.....	151	Lynn Fort	308
Bryan B. Gilmer.....	161	J. C. Ridenour, Sr. ..	319
Max Samson	187	G. W. Burton	321
Lucien E. Lyons.....	190	Wm. S. Cavedo.....	326
		Harry S. Arrington..	349

Total 41 witnesses.

Class B. Physicians to whom no representations were made, who testified to knowledge and prescriptions of Coco-Quinine and knew of no other similar preparation.

Names of Witnesses	Rec., Vol. I Page
Walter D. Hoskins...	76
Geo. W. Walker.....	84
R. L. Randolph.....	128
Field V. Gremillion...	129
Allen J. Perkins.....	132
Berna C. Fry.....	141
Edward C. Ferguson.	152
George H. Spurlock..	153
O. N. Arrington.....	209
Ezra H. Walker.....	258
Coleman F. Pearson..	271
Wm. C. Pumpelly....	301
E. C. Fisher.....	324
Edward T. Hargrave.	351
Frank L. Eskridge...	375

Total 15 witnesses.

Dr. Hoskins testified that he knew of Coco-Quinine and of no other chocolate quinine preparation. He prescribed Coco-Quinine and no other liquid Quinine preparation (Rec., Vol. I, p. 76).

Class C. Druggists and physicians who testified to perfectly proper representations by petitioner's salesmen that Quin-Coco was the same—or about the same—as Coco-Quinine, had same ingredients and formula and sold at a lower price.

Names of Witnesses	Rec. Page
D. B. Dunham.....	28 (Vol. I)
Stephen D. Knox.....	125 (Vol. I)
Wm. C. Chestnutt.....	147 (Vol. I)
Jeptha C. White.....	649 (Vol. II)
Amos L. Vaughan.....	254 (Vol. I)
Hill W. Howell.....	262 (Vol. I)
Wm. Heim	730 (Vol. II)
Walter S. Lindsay.....	332 (Vol. I)
Herbert N. Henckell.....	87 (Vol. I)
Michael R. Willis.....	478 (Vol. II)
Jesse E. Greene.....	505 (Vol. II)
David J. Kuhn.....	515 (Vol. II)
O. S. Mayfield.....	234 (Vol. I)
Wm. Seeger, Jr.	665 (Vol. II)
A. Homer Sinclair.....	679 (Vol. II)
Wm. J. Powell.....	681 (Vol. II)
H. D. Ashton.....	789 (Vol. II)

17 witnesses.

Class D. Druggists, one physician and three traveling salesmen whose testimony was trivial and unimportant, relating to sale of other specialties and indefinite and proper representations by petitioner's salesmen.

Names of Witnesses	Rec., Vol. I Page	Names of Witnesses	Rec., Vol. II Page
Raoul R. Haas	71	Carl H. Ege	418
John R. Tague	110	John H. Weber	422
Robert L. Winchester	112	Chas. S. Lebo	429
Wm. O. Schuler	162	Sam'l H. Bell	435
Fred A. Burns	170	Henry B. Smith	443
Howard S. Smith	171	H. W. Dunn	475
Fred R. Daly	256	Francis M. King	481
Avington C. Fancher	265	Wm. C. Dirmeyer	546
Stephen D. Coleman	298	Solomon R. Hamilton	547
John H. Vinson	297	John Van Dale	720
		Maurice W. Watson	773
			21 witnesses.

For example. John R. Tague, Rec., Vol. I, p. 110, testified only that he had stocked Quin-Coco four or five years ago at the solicitation of one of the Warner salesmen to fill such orders as might be turned over to his drug firm by the Warner salesmen.

Class E. Seven respondent's salesmen, and two other witnesses, who testified to alleged wrongful substitution by druggists *without representation or request* of petitioner's salesmen.

Names of Witnesses	Rec., Page	
William H. Martin	54	(Vol. I)
Otto H. Kessell	70	
John B. Messenger	90	
Chas. O. Broussard	134	
Walter L. Griffin	163	
Harry W. Lyle	204	
C. C. Tisdale	248	
LeGrand B. Wetzel	335	
Dr. H. H. Brown	670	(Vol. II)
		9 witnesses.

The testimony of all of these witnesses but Martin and Kessell was merely hearsay.

Martin (Rec., Vol. I, p. 55) testified:

> That he saw a prescription for Coco-Quinine handed in at one store and the druggist filled it with Quin-Coco. Kessel (id., p. 70) was present and testified that the clerk said it was the only Coco-Quinine he had in the house.

Comment: There was no evidence of any representation by Warner salesmen.

Class F. Druggists who testified that Warner salesmen represented that Quin-Coco was the same as Coco-Quinine and cheaper in price.

Names of Witnesses	Rec., Vol. I Page	Names of Witnesses	Rec., Vol. I Page
William A. Schaefer..	155	Edwin R. Albright...	236
Bertram A. Wright..	68	Julius R. Prochnow..	165
Ellis B. Stovall.....	233	F. D. Nelligar.....	347
Gus A. Blodau.....	105	A. J. Garner.....	377
Carl O. Manning.....	109		

9 witnesses.

The testimony of these witnesses is so bare of the slightest imputation of fraud, as to lead the Court wholly to disregard it and eliminate these witnesses as not proving anything of value on the issue of unfair competition.

Class G. Druggists who testified that Warner salesmen represented that Quin-Coco was identical with Coco-Quinine and could be used in place of Coco-Quinine.

Names of Witnesses	Rec., Vol. I Page	Names of Witnesses	Rec., Vol. I Page
Louis Pink	30	John B. Reid.....	272
James A. Kinder....	81	John M. Moseley....	276
Charles Heno	201	William A. Jolly.....	285
Sol C. Ray.....	210		

7 witnesses.

In this class, seven witnesses testified to representations that Quin-Coco was the same as Coco-Quinine and could be used in its place or as a substitute for Coco-Quinine. These representations were consistent with fair dealing, as a competitive and identical article may properly be sold at a cheaper price to supplant another in legitimate competition, when the plaintiff had no superior rights entitled to protection.

We have thus analyzed the evidence of witnesses in classes:

	Witnesses
A	41
B	15
C	17
D	21
E	9
F	9
G	7
	119,

out of a total of 129 witnesses called on respondent's direct case and by a process of elimination the testimony of these 119 witnesses should be wholly disregarded as absolutely insufficient to sustain the burden of proof.

There remain, however, the following witnesses forming:

Class H. Druggists who testified that representations were made that Quin-Coco could be used in place of Coco-Quinine on prescriptions and calls for Coco-Quinine.

1st: The evidence is contradicted by the petitioner's salesmen whose names are given.

2nd: No evidence is presented that such representations were authorized, sanctioned or approved by any of the petitioner's officers and managing agents, or known to them or any of them.

CLASS H.

Names of Witnesses	Rec., Vol. I Page	Names of Witnesses	Rec., Vol. I Page
Albert F. Knowles...	65	William M. Merithew.	60
Joseph N. Wolsey....	77	William M. Scott....	113
Valleix B. Richard...	143	Edmund F. Barnes...	179
John F. Whitley.....	387	Wesley S. Ames.....	217
Charles A. Noiret....	406	Oscar J. McMillan...	244

10 witnesses.

The testimony of the last five named witnesses in Class H has been abstracted above (pp. 44-49) and the specific denials of the salesmen named quoted. We will now consider the other five of them.

KNOWLES (Vol. I, p. 65), a druggist in Saginaw, on cross examination, testified that this was what the salesman said:

Answer to XQ28: "He took a sample of Quin-Coco from his grip and asked me if I handled that product. I said, 'No, I have always handled Coco-Quinine for all such calls.' He said, 'Well, don't you think you could handle this to your advantage?'"

ROGERS (Vol. III, p. 1449, Q67 to XQ77), the Warner salesman, denied that such a conversation had taken place.

STARRING (Vol. III, p. 143, Qs61 to 74), another Warner salesman in the same territory, also denied the conversation. He had sold Knowles one gallon of Quin-Coco, but had not discussed it.

WOLSEY (Vol. I, p. 77), a retail druggist in Cape Girardeau, testified as to what the salesman said to him (RXQ35): "I could buy a gallon of it and use it for the same purpose as Coco-Quinine for less money. *I think that is the exact words.*"

BROWN (Vol. III, p. 1405, Qs16 to end), the Warner salesman mentioned by Wolsey, denied Wolsey's statement.

RICHARD (Vol. I, p. 143, Q6), a druggist of Jennings, La., testified that Jones, a Warner salesman, had asked him to buy Quin-Coco and "show it to his doctors and ask them if they would use this instead of Coco-Quinine and that it would be more money in it for me."

Again, at XQ23, Jones "asked me to use Quin-Coco. It is like Coco-Quinine. You can't tell the difference."

At XQ24, "* * * he advised me to show it to physicians and ask them to prescribe it."

At XQ32, asked whether Jones made him any dishonest proposition, Richard said, "I am positive he did not."

JONES (Vol. III, p. 1326, Q22) testified as to his regular "sales talk." Richard's testimony was read to him (Qs 31, 32). He denied the statements.

WHITELEY, a druggist of Winfield, La. (Vol. I, p. 389), testified that Wilkins, a Warner salesman, told him that Quin-Coco "was the same thing, two grains of quinine to the drahm, put up in chocolate" (XQ42).

> "The very words he used were: 'Well, he said it was precisely the same thing and could be used just as we were using the Coco-Quinine' " (XQ43).

He added (XQ64): Wilkins is "a mighty good man."

WILKINS (Vol. III, p. 1318, Q60) denied that he said to Whiteley that he could dispense Quin-Coco the same way on calls for Coco-Quinine.

NOIRET (Vol. I, p. 407, Q7), a traveling salesman for a third party (but after he testified here taken into respondent's employ), testified that he happened into drug stores in three Mississippi towns and heard Jones and Smith (Warner salesmen) say to the druggists that "the two products were so much alike you could not detect the

difference" (a fact shown by ordinary inspection of the articles).

But counsel for respondent visited two of these same towns and took testimony but he did not examine the said druggists in corroboration. The third town was near those two, but counsel called no witness from it.

JONES (Vol. III, p. 1329, Q49), one of these Warner salesmen, denied that "he had ever sold a bill in the presence of Noiret" or talked to him about Quin-Coco.

SMITH, the other salesman, had left the petitioner's employ and was called as a witness by the other side and could not be called by petitioner.

We have thus disposed of all of the 129 witnesses called on the plaintiff opening case—druggists and physicians whose testimony seems to require consideration. We submit that but half a dozen testified on direct that "unfair" statements had been made to them by a Warner salesman and that these on cross examination so modified their testimony that it failed, in any substantial degree, to sustain the respondent's case.

If Smith's selling methods were improper, no druggist whom he solicited has been called by respondent.

The Salesmen's Records.

During the period in question, July, 1908-1916, the petitioner employed a sales force of about 75 travelers. In those years they had 313 different men on the road, taken on and laid off (Vol. III, p. 1645, by stipulation).

Of this number, only 11 were referred to by any of respondent's witnesses in the opening case. This is one salesman out of 28, on a bill charging the broadest "unfair" methods.

A Consideration of the Impugned Salesmen.

NOTTINGHAM, when he testified (Vol. III, p. 1422), had been with the company for seven years. He had about 800 druggists on his list, on all of whom he called several times a year. But just one druggist (a young man of 22 in a Southern village) was the only witness who impugned Nottingham, and he, we submit, broke down on cross examination. Nottingham denied Jolly's statements explicitly (Q30).

MOON had been with the petitioner since it was chartered, and for seven years before that with the old Warner Company (III, p. 1462). He visited 600 drug stores 3 or 4 times a year. Only a single druggist, E. B. Allen, was called to impugn Moon's methods, while 4 (or if we include the rebuttal, 5) of respondent's witnesses gave testimony which showed that his methods were correct.

RICHARDS had been with the Pfeiffer Chemical Company for 5 years and after that with the petitioner, with whom he was when called (III, p. 1339). He visited about 1,500 drug stores from 2 to 6 times yearly. Only 2 of respondent's witnesses gave testimony tending to show that his methods were unfair, and one of those was 5 or 6 years stale; while one witness called by respondent (or if the rebuttal is included, 3) testified to correct methods.

JONES visited 500 drug stores 4 times a year. He had traveled for petitioner from its organization, and before that for 6 years with one of its affiliated companies (Vol. III, p. 1325). Four druggists were examined by respondent to prove that his methods were unfair. One was 3 or 4 years stale, another went "4 or 5 years back." But 3 others of respondent's witnesses gave evidence which showed that Jones's selling methods were correct.

GONZALES, with 4 or 5 years of service with the petitioner, had 300 drug stores at which he called 4 times yearly (III, p. 1356). Two of the druggists were called to impugn him.

ROGERS had had over 3 years of service with the petitioner. He had 1,300 druggists and made 3 calls a year (III, p. 1444). But a single one of them was called and referred to his methods.

DE VALL, with 3 years' service, had about 450 druggists on whom he called from 3 to 6 times a year (III, p. 1383). Two of them referred to him and another of them attributed correct selling methods to him.

MCNULTY (III, p. 1251) had been with the petitioner since it was organized. He was referred to by a single druggist called by respondent.

MCCARTHY was a Warner salesman for about 4 years (III, p. 1367). He called on druggists and on 75 per cent. of the dispensing physicians. He was referred to by 3 druggists and by 1 called in rebuttal.

ROGERS (III, p. 1444), when he testified, had been a salesman for over 3 years. He visited some 800 drug stores, formerly about 500, calling on each from 1 to 4 times a year. He was referred to by 3 druggists as having solicited their trade.

RITAYIK (III, p. 1301) had been with petitioner 9 years, as a traveling salesman for 2 years and then assistant sales manager for 5 years. He was mentioned by one druggist called by respondent.

STARRING (III, p. 1428) began as a salesman in 1913. He was examined two and a half years later. His territory included about 800 drug stores; he visited them 3 times a year. Three druggists referred to him.

WILSON (III, p. 1621) was referred to by 2 of the druggists called by respondent.

O'CONNELL (III, p. 973) had been a Warner salesman for 3 years. Not a single druggist was called to impugn his selling methods. He was a witness for the *respondent*. If his selling methods were "unfair" no druggists upon whom he practiced them have been called to corroborate him.

BROWN, E. R. (III, p. 1403), was a graduate in medicine of Washington University, St. Louis, a practitioner of medicine and a registered pharmacist. He visited 1,000 drug stores about 3 times a year and all the dispensing doctors as many times. Two of these druggists referred to his selling methods.

We have shown elsewhere that all the charges against these salesmen were specifically denied by them respectively.

We have thus disposed of all of the 129 witnesses called on the plaintiff's opening case—druggists and physicians—whose testimony seems to require any consideration. We submit that but a half dozen testified on direct examination that unfair statements had been made to them by a Warner salesman and that, on the other hand, these, on cross examination, so modified their testimony that it failed, in any substantial degree, to sustain the respondent's case.

We contend that we have shown conclusively that there is no ground for the statement in the opinion of the Court below that the practice of improper selling methods was "fully established by the evidence of an unusual number of witnesses" and that it "was so general that the defendant is charged with knowledge of it and is, accordingly, answerable for it in the measure prescribed by law" (275 Fed., 755).

The testimony in rebuttal was improperly offered and should have been excluded by the trial court and, we submit, should not have been considered by the Circuit Court of Appeals. This testimony was given over specific objection on petitioner's behalf that it was part of respondent's prima facie case and not rebuttal* (Rec., Vol. II, pp. 416-17). *The testimony was contradicted in essential particulars by the respective salesmen, whose selling methods had by respondent been impugned.

1. E. H. WHITE (Rec., Vol. II, pp. 531-532), called on behalf of respondent, testified:

> that in the spring of 1910, Wilkins, petitioner's salesman, showed Quin-Coco to Mr. Whitley, druggist for whom witness worked, and witness, stating he "could sell this preparation to us to be used as Coco Quinine at a less expense and a saving on the original Coco Quinine" * * * that it contained two grains of quinine sulphate to the teaspoonful and that he was selling only to the trade in general for the Coco Quinine preparation and that he could sell it to us in gallon lots at about the same cost as we had been paying for the five pints of Lilly's Coco-Quinine" (Rec., Vol. II, p. 532). White further testified that Gonzales, defendant's salesman, solicited his business for Quin-Coco, "that it was a saving in price over Lilly's Coco-Quinine * * * and he knew I could use it at the place where I was now for Coco-Quinine * * * he could sell me his preparation, Quin-Coco, in gallon lots, to take the place of Coco-Quinine, as Lilly had taken their Coco-Quinine off the market in gallon lots, * * * ." (Rec., Vol. II, p. 532.)

Comment: WILKINS by stipulation denied the statements attributed to him by witness White (Rec., Vol. III, p. 1643). White confessed that the Whitley store, with which he was connected, dispensed Quin-Coco on

calls for Coco-Quinine (Rec., Vol. II, p. 533), but there was no evidence that this practice had been induced by any representations.

2. WALKER (Rec., Vol. II, p. 541) testified:

> that Wilkins, petitioner's salesman, said it (Quin-Coco) was much cheaper than Coco-Quinine, as you could buy a gallon for what five pints of Coco-Quinine would cost, and that it could be dispensed on a doctor's prescription when Coco-Quinine was specified and was being dispensed all over the country as Coco-Quinine.

WALKER, also, was called in rebuttal to corroborate Whiteley's testimony in chief. It was not proper in rebuttal and was objected to.

Comment: WILKINS, it was stipulated, would deny the statements of Walker as the witness could not be produced (Rec., Vol. III, p. 1644). The witness Walker admitted that Quin-Coco, previous to this time, had been carried in the stock regularly and prescriptions for Coco-Quinine had been filled with Quin-Coco, but there was no evidence that this practice was the result of any previous representations.

3. CULVER (Rec., Vol. II, pp. 549-550) testified:

> that Jones, petitioner's salesman, said it (Quin-Coco) was absolutely identical with Coco-Quinine and could be used in its stead and solicited the business on it on the strength of the difference in price between the Quin-Coco and Coco-Quinine. He sold it to be dispensed in place of Coco-Quinine on the representation that neither the doctor nor any one else could tell the difference between that and Coco Quinine.

But he entirely modified this on cross examination, when he testified (p. 554, XQ28):

"A. The substance of Jones' remarks to me * * * were (was) that the two preparations were identical, and that Quin-Coco could be used in place of Coco-Quinine, and that it was to our advantage to use it inasmuch as the price was much lower than Coco-Quinine."

Comment: JONES positively denied these statements of the witness (Rec., Vol. III, pp. 1611-12). It is a fair deduction from this testimony that Culver dispensed Quin-Coco improperly (Rec., Vol. II, p. 553).

4. STUCKEY (Rec., Vol. II, p. 558) testified:

that McCarthy, petitioner's salesman, said "he had a preparation called Quin-Coco, which was the very same thing, and he could save me some money on it. * * * He said I could put it up and people would not know the difference between his and Lilly's. * * * I could put it up on prescriptions [for Coco-Quinine], that I would not be doing anything wrong, as it was the very same thing as Coco-Quinine. * * * I could put it up and label it Coco-Quinine; that I could sell it under the label of Coco-Quinine" (p. 559).

On cross examination, when asked to give the salesman's words "verbatim," he said only this:

"XQ27. How did he say it to you? In what words?

"A. He said Quin-Coco was the same thing as Coco-Quinine and I could save money on it, about the same thing every time he talked about it.

"XQ28. What were the words he used? Have you given them all in answer to my question?

"A. I think I have."

Comment: MCCARTHY in substance denied this accusation (Rec., Vol. III, p. 1371). He had left the petitioner's employ and could not be recalled; but his evidence earlier

in the case in denial of any improper selling methods sufficiently traverses the statements of Stuckey.

5. Edmondson (Rec., Vol. II, p. 639) testified:

> that Jones, petitioner's salesman, said it (Quin-Coco) was a chocolate quinine that could be sold and dispensed in place of Coco-Quinine and that it was the same kind of preparation and could be used for the same purpose as Coco-Quinine. That he did not remember what Jones said the first visit—after that Jones merely asked if he wanted any Quin-Coco (Qs 9, 10).

Comment: Jones denied that he ever stated to any one that he could substitute (Rec., Vol. III, p. 1612).

6. Moise (Rec., Vol. II, p. 643) testified:

> that Jones said that he backed Ritayik in the latter's statement that everybody along the road was using it when the doctors prescribed Coco-Quinine and that they could not tell the difference.

Comment: Ritayik declared Moise's statement "an absolute falsehood." Jones' general denial of "unfair" selling methods will serve as a denial of Moise's statement (Rec., Vol. III, p. 1613).

7. Lavison (Rec., Vol. II, p. 690) testified:

> that Kelton, petitioner's salesman, afterwards employed by respondent, represented Quin-Coco to be exactly the same in every respect as Coco Quinine and that it could be used as a substitute on physicians' prescriptions written for Coco-Quinine without anyone knowing the difference.

He also testified that Kelton had, the next day, brought Mr. H. Pfeiffer to his shop, and as to what was then said.

What Lavison said in chief he modified on cross examination. Thus (Rec., Vol. II, p. 695):

> XQ34. Can you give the language of Mr. Pfeiffer in the words in which he spoke?
> "A. * * * I know that he told me it was the same as Coco-Quinine, identically the same, and the difference could not be told, and that it could be used in any way that Coco-Quinine was used.
> "XQ35. That they were the same preparation in every way.
> "XQ36. And cheaper.
> "XQ37. That is the substance of what they both told me."

Comment: KELTON, who had left petitioner's employ and was examined at great length on behalf of *respondent*, testified that he sold Quin-Coco to take the place of Coco-Quinine, and if Coco-Quinine was called for to influence the customers to take Quin-Coco instead (*id.*, p. 96). Kelton emphatically denied that he ever suggested to a druggist to palm off Quin-Coco for Coco-Quinine (*id.*, p. 102). His testimony is considered, *supra*, p. .

8. MCCORKLE (Rec., Vol. II, p. 925) testified:

> that Wilson, defendant's salesman, said it (Quin-Coco) could be used for Coco-Quinine to fill calls for Coco-Quinine, to be used as a substitute for it.

On cross examination:

> "RXQ51. State what words he used, etc.
> "A. I understood it by him stating that it had the same appearance and was the same formula as Coco-Quinine."

This was put in as re-rebuttal and was objected to for that reason. It belonged in the opening case.

WILSON denied these statements (Rec., Vol. III, p. 1623).

9. L. S. JAMES (Rec., Vol. II, p. 925) testified:

> that Wilson said that "we could dispense it (Quin-Coco) on orders for Lilly's Coco-Quinine, either on prescriptions or over the counter."

XQ40—When asked to give the salesman's exact words he answered: "He asked if we sold Lilly's Coco-Quinine. I told him we did. He said, 'I have it,' and reached into his sample case * * * and said it would cost us about half as much as Lilly's Coco-Quinine."

"XQ41. I think that is all."

This witness also was called in re-rebuttal under objection.

WILSON denied these statements (Rec., Vol. III, pp. 1621, 1626-7).

POINT IX.

Even if the Circuit Court of Appeals were right in finding petitioner guilty of using unfair selling methods in selling Quin-Coco, it was error to deprive petitioner of the exercise of its admitted right to duplicate respondent's product by a preparation of its own, by enjoining it from using chocolate in such preparation.

The evidence shows that chocolate is used, not merely for its color, but because of its taste, and that it was used to disguise the flavor of quinine long before respondent made its preparation Coco-Quinine *(supra,* pp. 25-27).

The "unfair" competition, if any, consisted of representations made by the petitioner's salesmen to druggists that they could "pass off" Quin-Coco for Coco-Quinine in filling prescriptions and on customers over the counter.

Even assuming that the Circuit Court of Appeals was justified in finding from the evidence that the petitioner's salesmen had made such representations, the injunction should have been so framed as only to prohibit the petitioner and its salesmen from hereafter making such representations to the druggists in soliciting their trade in Quin-Coco.

The Circuit Court of Appeals transcended its powers in making a decree which would take away from petitioner its right to put up chocolate and quinine under a name and label not infringing the trade-mark rights of the respondent, while expressly in its opinion disclaiming any intimation that the manufacture and sale of a chocolate and quinine preparation similar to Coco-Quinine, of which there were a dozen different makes on the market (Rec., Vol. III, p. 1207), is not open to all the rest of the world.

The following authorities support the proposition that where both parties have rights in a particular name, the injunctions should be so framed as to preserve the rights of each as far as possible:

In *Hygeia Distilled Water Co.* v. *Hygeia Ice Co.*, 70 Conn., 516, the trial court enjoined the defendant from engaging in any way or manner in the business of selling distilled water and products made therefrom so long as it retained the word "Hygeia" as a part of its corporate name, and from using its corporate name conspicuously or otherwise in such business. On appeal the Court held that the facts did not warrant such a sweeping decree and that for this error the entire judgment must be set aside and a new trial ordered basing its decision upon the concession

> "that the plaintiff has no monopoly of the business of making and selling distilled water and products made therefrom, as a beverage, and that any one may engage therein; the only claim is that any person engaging therein must not use the word

> 'Hygeia' in such a way as to constitute an infringement of the plaintiff's rights in that word" (p. 536).

In *Meriden Brittania Co.* v. *Parker,* 39 Conn., 450, the Court held that the defendant should be enjoined from the use of a stamp "1847 Rogers Bros. A-1" and the use of the words "Rogers Bros.", saying (p. 461):

> "But the use of the name 'Rodgers' ought not to be prohibited. We cannot say that every use of that name will necessarily infringe upon the petitioners' trade-mark. If it may be so used as not to infringe, it would be manifestly unjust to forbid such use by the respondent, inasmuch as his title to the mere name is as good apparently as the petitioners'."

In *Jergens Co.* v. *Woodbury,* 197 N. Y., 66, it was held that where a contract authorized the purchaser of a business to use a certain proprietary or trade name when applied to several commodities expressly specified therein, the purchaser may have an injunction against the vendor prohibiting the sale of a preparation resembling an article specified in the contract, but that an injunction goes too far when it forbids the vendor from using the proprietary name on other articles, where such use is not deceptive. The injunction prohibited the use of the name "Woodbury" on any soap under any name which contains "Woodbury." The Court held that the injunction was too broad in forbidding the use of the name Woodbury on other soaps or in connection with other articles, where such use was not deceptive or misleading.

In *Stark Bros. Nurseries & Orchards Co.* v. *Stark,* 248 Fed., 154, the head-note is, in part, as follows:

> "Defendants, though they bore the name 'Stark,' which was part of the corporate name of complainant, which had long been established in the nursery business, while entitled to do business under

> their own name will be enjoined from using an infringing trade-mark, or the word 'Stark,' on their labels *save in such a manner as would not indicate to the trade that their goods were those of complainant, or that they were complainant's successors.*" (Italics ours.)

On appeal, the decree was modified as to the form of the injunction (257 Fed., 9), by giving the defendants the right to use their surname, accompanied by information that they were not the original Wm. Stark Nurseries nor connected with the Stark Bros. Nurseries & Orchards Co., or their predecessors, under whatsoever name their business was conducted and that their trees were not the product of any of these concerns or their successors, and directing them to insert in their circulars, catalogues and advertisements a notice stating the rights of the defendant, his family, history, connection with the nursery business and affirmatively stating that he has no connection with the nursery business of the Stark Bros. Nurseries & Orchards Co. The Court on appeal also modified the decree by limiting the right to recover profits from the time of giving notice of infringement under the Trade Mark Act. This notice was given only a few days before the institution of this suit.

The plaintiff secured a writ of certiorari in the U. S. Supreme Court (250 U. S., 657), presumably on the ground of limitation of the right to recover profits. The Supreme Court affirmed the decree of the Circuit Court of Appeals that an account for profits could only be taken from the date of the notice under the Trade Mark Law. (255 U. S., 50.)

The Circuit Court of Appeals largely bases its decision upon that of the Court of Appeals for the Sixth Circuit in *Coco-Cola Co.* v. *Gay-Ola Co.*, 200 Fed., 720; 211 Fed., 942.

That case was one of barefaced fraud and yet the Circuit Court of Appeals of the Sixth Circuit did not go so far as to prohibit the use of the color of the liquid absolutely, but declared that *so far as defendant could not safeguard or prevent confusion it could not use the color.*

On the second appeal, in 211 Fed., 942, the Court directed an injunction to issue in the following form:

> "* * * that the said defendant, its directors, officers, agents, servants, employees and assigns, and each and every one of them be and they are hereby perpetually enjoined, restrained and prohibited from selling, or disposing of Gay-Ola of the same or substantially similar color to Coca-Cola, except when the same is sold by it in bottles, receptacles or packages marked or labeled prominently with the name of the defendant's product and designed and intended to be sold and delivered to the ultimate consumer in said original bottle, receptacle, or package, with said mark or label still remaining thereon." (211 Fed., 942, 944.)

In settling the form of the decree the Court said:

> "We think the decree should absolutely prohibit sales by the Gay-Ola Company *unless in the form prescribed for ultimate use*" (p. 943; italics ours.)

The facts in the case cited established a clear case of fraud.

The defendant used the formula of Coca-Cola, adopted caramel as a coloring agent *only to produce a liquid of the same appearance as Coca-Cola;* used the same script in printing its trade-mark as used by the complainant, painted its barrels and kegs red as did the complainant, which first adopted this color for its bulk containers, and boldly issued circulars and letters to bottling companies, engaged in bottling Coca-Cola, suggesting that the bottlers could substitute Gay-Ola for Coca-Cola, and patrons would never know it, and the defendant

would ship Gay-Ola to soda fountain proprietors in plain unmarked packages so that his dealings with them would not be discovered and consumers would not know that he was selling Gay-Ola for Coca-Cola.

The Court, on the first appeal, after referring to the evidence showing that defendant's business had a substantial basis in a contemplated fraud and stating that wherever it could and as the easiest way of getting a large business, it intended to have its product sold as and for Coca-Cola, said:

> "Under these circumstances, we need not consider what the rule would be if the color was the incidental result of an ingredient used for some other purpose, nor yet what the rule would be if the defendant had adopted even a wholly unnecessary identity in color in connection with a good faith effort to sell its own goods on their own merits. This Court has not yet said that a case of fraudulent competition can be made out solely by proof of identity in a nonfunctional particular (*Rathbone Co.* v. *Champion*, 189 Fed., 26). * * * We rest our conclusion here upon the fact that the color was adopted in part as a means of aiding the contemplated fraud, and that if its adoption was also in part innocent, there is here a confusion caused by defendant; that the burden is therefore upon defendant to see to it that ultimate fraud does not result from this confusion; and *that, so far as defendant cannot safeguard this result it may not use the color.* There is here marked—indeed, close—analogy to the rule of *Westinghouse Co.* v. *Wagner Co.* (225 U. S., 604) and to the rule which requires an article which is likely to deceive as to its origin to be distinctly tagged with the name of the real producer." (200 Fed., 720, 724, italics ours.)

In the case of *Lever* v. *Goodwin*, 57 L. T. N. S., 583, which was another case of palpable fraud, the Court issued an injunction restraining the defendants from sell-

ing, offering for sale or disposing of, any soap in the wrapper and of the form of any one of the three exhibits admitted in the action to have been issued by the defendants, *or in any form calculated or intended to pass off or enable others to pass off such soap as and for the goods of the plaintiff.*

It was contended by counsel for appellant in that case that as there was no trade-mark in "Self-Washing" or "Self-Washer," there was no monopoly in parchment paper or in the spaced printing, and that the defendant therefore should not be restrained from using those things as to which the plaintiff cannot claim a monopoly.

The Court overruled this contention by saying (at p. 584):

> "That is an obvious fallacy. There may be no monopoly at all in the individual things, but if they are so combined by the defendants as to pass off the defendants' goods as the plaintiffs', then the defendants have brought themselves within the old common law doctrine, in respect of which equity will give to the aggrieved party an injunction, in order to restrain the defendants from passing off their goods as those of the plaintiffs."

Nims on Unfair Competition, 2nd Ed., p. 648, says:

> "The injunction should, however, be no broader than is necessary to give adequate protection to the plaintiff. Where the case involves a name that is *publici juris,* the injunction should not be too general in terms but should show that it is the trade meaning of the word or name and not its general meaning that is involved. Where the plaintiff possesses full rights to a trade use of a fanciful word or term, the injunction may be absolute."

In *Meyer* v. *Dr. B. L. Bull Vegetable Medicine Co.,* 58 Fed., 884, the injunction finally granted in the Circuit Court of Appeals was broad, enjoining the defendant

from selling or disposing of any remedy or preparation to which shall be applied in any form or manner the words: "Dr. B. L. Bull's Cough Syrup," or the words "Bull's" and "Cough Syrup," with or without other words, and from making use of wrappers like that marked "Defendant's wrapper" or those substantially like it, and from using any name or designation calculated to cause its article to be known in the market, and sold as "Dr. Bull's Cough Syrup." *But it was expressly declared, that "the writ of injunction thus to be issued shall not (except as to the name or part of the name thereof, as aforesaid) prohibit the defendant from in every fair and lawful manner stating in the wrappers or labels by it used and otherwise that its article is by it manufactured and sold, and from so fairly and lawfully stating any other fact which it may elect or desire to state"* (p. 886).

In *Von Faber* v. *Faber*, 124 Fed., 603, the Court held that the complainant was entitled to a decree

> "enjoining and restraining the defendant from using the name 'Faber' alone as applied to pencils or rubber stationer's goods, and from using the name 'Faber Pencil Company,' or 'E. Faber Pencil Company,' and from making, selling, or causing to be made or sold, or advertising, or causing to be advertised, any lead pencils, erasive rubber, or rubber bands, bearing thereon, or on the labels, wrappers, boxes or other coverings affixed thereto, or in which the same are contained, the name 'Faber' or 'Faber Pencil Co.' or 'E. Faber Pencil Co.' or any like or similar designation in which the name 'Faber' is used without the prefix 'Eberhard,' or 'John E.,' or 'J. Eberhard,' *but the defendant may use the word 'Faber' with either of said prefixes as he may elect*" (p. 614. Italics ours.)

In *N. K. Fairbank Co.* v. *R. W. Bell Mfg. Co.*, 77 Fed., 869 (C. C. A., 2nd Circuit), it was held that

> "injunction should issue against putting up and selling or offering for sale 'the particular form of package * * * put in evidence as "Defendant's Second Package," or any other form of package which shall, by reason of the collocation of size, shape, colors, lettering, spacing, and ornamentation, present a general appearance as closely resembling the "Complainant's Package," referred to in the bill and marked in evidence, as does the said "Defendant's Second Package."' *This injunction shall not be construed as restraining defendant from selling packages of the size, weight, and shape of complainant's package, nor from using the designation 'Buffalo Soap Powder,' nor* from making a powder having the appearance of complainant's 'Gold Dust,' nor from using paper of a yellow color as wrappers for its packages, provided such packages are so differentiated in general appearance from said 'Complainant's Package' that they are not calculated to deceive the ordinary purchaser" (pp. 878-879; italics ours).

In *Hall's Safe Co.* v. *Herring-Hall-Marvin Safe Co.*, 146 Fed., 37; affirmed 208 U. S., 554, the Circuit Court of Appeals in the 6th Circuit, modified an injunction issued by the U. S. District Court so as to read as follows:

> "The defendant * * * its servants, agents, officers, and employees, are perpetually enjoined from carrying on the safe or vault business in the name of Hall's Safe Company, or any other name having similarity to the name Hall's Safe & Lock Company, without also giving information to the public that it is not the business formerly carried on by the Hall's Safe & Lock Company, and from marking, advertising, or otherwise designating its safes and vaults as the products of the Hall's Safe & Lock Company, or its successors in business, or pretending that it is carrying on the business started by Joseph Hall, and continued by the

> Hall's Safe & Lock Company, and from interfering in any manner with the exclusive right of the complainant to possess and enjoy the good will acquired by the Hall's Safe & Lock Company, and from using the trade-mark of said last named company without at the same time so qualifying such trade name as to show that the trade name used is not the one formerly used to designate the products of the Hall's Safe & Lock Company."

In the case last cited, on appeal to the U. S. Supreme Court, HOLMES, J., said that the injunction against the Company should be made less broad and more specific:

> "It should forbid the use of the name Hall either alone or in combination, in corporate name on safes, or in advertisements, *unless accompanied by information that the defendant is not the original Hall's Safe & Lock Company, or its successor,* or, as the case may be, that the article is not the product of the last named company or its successors. With such explanations the defendants may use the Hall's name, and if it likes may show that they are sons of the first Hall and brought up in their business by him, and otherwise may state the facts" (p. 560; italics ours).

POINT X.

For the reasons above set forth it is respectfully urged that the judgment of the Circuit Court of Appeals be reversed and that of the District Court affirmed, or that at least the judgment of the Circuit Court of Appeals be modified so as to relieve petitioner from the injunction against the use of chocolate in the manufacture of its product Quin-Coco.

August 31, 1923.

FRANCIS RAWLE,
GEORGE W. WICKERSHAM,
ROGER S. BALDWIN,
JOSEPH W. HENDERSON,
Of Counsel for Petitioner.